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No. _____

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1993

SACRAMENTO CITY UNIFIED SCHOOL DISTRICT
BOARD OF EDUCATION,

Petitioner,

v.

RACHEL HOLLAND, by and through her guardian ad litem,
ROBERT HOLLAND, *et al.*,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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125 pp

QUESTIONS PRESENTED

The Individuals With Disabilities Act (IDEA) provides two mandatory requirements for educating a child with disabilities: (1) that the child be provided with a "free appropriate educational program" specifically tailored to meet the child's unique needs, and (2) that the child be integrated into the regular education environment ("mainstreamed") to the "maximum extent appropriate." After a substantial evaluation of the particular needs of Rachel Holland, a moderately mentally retarded child, the school district's special education professionals determined that the maximum appropriate level of mainstreaming was a program of half-day mainstreaming, with the remaining half of the day devoted to providing Rachel with specially-tailored education designed to meet her unique educational needs. The tribunals below have each struck down this program for Rachel, holding that the IDEA creates a presumption that full-time mainstreaming is the appropriate placement for all children with disabilities, which can be overcome only by a showing that all possible efforts have been made to fully-mainstream the child, and all have failed.

The questions presented are:

1. Where educational professionals determine through validated achievement and aptitude testing that a disabled child has not and cannot achieve measurable academic progress in a full-time regular education environment, but

rather requires a specialized educational setting for at least part of the day to appropriately address the child's unique educational needs, can the educators place the child in less than a full-time mainstreaming program?

2. If not, must a school district first subject a disabled child to repeated failure in a full-time mainstreaming environment in order to have a "record" of the inappropriateness of full-time mainstreaming, before it can place the child in a program that involves less than full-time mainstreaming?

3. With respect to the Ninth Circuit's rejection of the two tests presently in effect in the other Circuits, and creation of a new test for the Ninth Circuit, should a disabled child's federal mainstreaming rights depend on the Circuit in which the child resides?

4. Where Regulations implementing the IDEA require that decisions as to the appropriate placement for a disabled child be made only after consideration of data from standardized "aptitude and achievement tests" administered by persons "knowledgeable about the meaning of the valuation data," can a Court disregard this same data on the basis that such standardized testing represents an "educational philosophy" that is inconsistent with the mainstreaming preference on account of its focus on a child's "limitations"?

5. Is it a violation of the federal mainstreaming preference for the Court to order placement of a disabled child in a classroom where the other students' biological age is two years younger than the mainstreamed child?

LIST OF PARTIES

A. PETITIONER SACRAMENTO CITY UNIFIED SCHOOL DISTRICT, BOARD OF EDUCATION. The Sacramento City Unified School District, through its Board of Education, is the local educational agency that, at the time of the proceedings below, was responsible for educating Respondent Rachel Holland.

B. RESPONDENT RACHEL HOLLAND, by and through her guardian ad litem, ROBERT HOLLAND. Rachel Holland is a minor who, at the time of the proceedings below, fell within the educational jurisdiction of the Sacramento City Unified School District.

C. RESPONDENT WILLIAM HONIG. William Honig was the California State Superintendent of Public Instruction at the time of the proceedings below.

D. RESPONDENT CALIFORNIA STATE DEPARTMENT OF EDUCATION HEARING OFFICE, MCGEORGE SCHOOL OF LAW. The California State Department of Education Hearing Office, McGeorge School of Law is, and was at the time of the proceedings below, the administrative agency in California chartered to conduct administrative hearings under the Individuals With Disabilities Act, when a parent disagrees with a placement offered by a school district.

E. RESPONDENT MARY COTE. Mary Cote is the administrative hearing officer for the California State Department of Education Hearing Office, McGeorge School of Law, who rendered the initial administrative order in this case.

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RACHEL HOLLAND, by and through her guardian ad litem,
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Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

The petitioner Sacramento City Unified School District Board of Education respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Ninth Circuit, entered in the above-entitled proceeding on January 24, 1994.

OPINIONS BELOW

The opinion of the Court of Appeals for the Ninth Circuit is reported at 14 F.3d 1398 (January 24, 1994), and is reprinted in the appendix hereto, p. 9a, *infra*.

The opinion of the United States District Court for the Eastern District of California (Levi, D.J.) is reported at 78[6] F. Supp. 874 (March 2, 1992), and is reprinted in the appendix hereto, p. 24a, *infra*.

The decision of the California State Department of Education Hearing Office, McGeorge School of Law (Cote, H.O.) is not reported. It is reprinted in the appendix hereto, p. 54a, *infra*.

The supplemental decision of the California State Department of Education Hearing Office, McGeorge School of Law (Cote, H.O.) is not reported. It is reprinted in the appendix hereto, p. 49a *infra*.

GROUNDS FOR JURISDICTION

Petitioner initially invoked federal jurisdiction pursuant to 20 U.S.C. § 1415 by bringing suit in the United States District Court for the Eastern District of California. Judgment was entered against petitioner and in favor of respondents on March 2, 1992.

On petitioner's appeal, the Ninth Circuit Court of Appeals entered a judgment and opinion affirming the Eastern District's judgment, on January 24, 1994.

The jurisdiction of this Court to review the judgment of the Ninth Circuit is invoked under 28 U.S.C. § 1254.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

A. 20 U.S.C. § 1400 is reprinted in the appendix hereto, p. 1a, *infra.*

B. 20 U.S.C. § 1412(5)(B) is reprinted in the appendix hereto, p. 3a, *infra.*

C. 20 U.S.C. § 1413(a)(2) is reprinted in the appendix hereto, p. 4a, *infra.*

D. 34 C.F.R. Pt. 300.532 is reprinted in the appendix hereto, p. 5a, *infra.*

E. 34 C.F.R. Pt. 300.533 is reprinted in the appendix hereto, p. 6a, *infra.*

STATEMENT OF THE CASE

The Ninth Circuit's decision effectively forbids public educators from making a prospective determination that the nature and severity of a child's handicap are such that it would harm the child's educational progress to place the child full-time in regular education. Although reasonable sounding, the new "balancing test" created by the Ninth Circuit in effect requires that a school district subject a disabled child to repeated failure within a fully-mainstreamed environment, before the district can modify the child's program to more meaningfully address the child's unique educational needs. The new test created by the Ninth Circuit not only conflicts with the two separate tests presently existing in the respective Circuits, but imposes a failure requirement on disabled children that was never intended by Congress.

Rachel Holland is a moderately retarded child with an I.Q. of 40-44, who was nine years old at the time of the court trial.[1] From ages three to eight, Rachel was enrolled in various special education day classes within the Sacramento City Unified School District to implement her Individualized Education Program (IEP), which had been developed in

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[1] Moderate retardation identifies a range of mental retardation between "mild retardation" and "severe retardation," and is indicated when a person's IQ is in the range of 35-55. A "normal" IQ is considered to be 100. American Psyciatric Assn., Diagnostic and Statistical Manual of Mental Disorders (3rd ed., revised, 1987).

cooperation with Rachel's parents. During her kindergarten year, the District attempted to integrate Rachel into a regular education class for portions of the day. The District found these efforts to be unsuccessful, as Rachel did not appear to interact with the other children and did not model their behavior.

For the first-grade year, Rachel's parents sought to have Rachel mainstreamed full-time in a regular education class. When Rachel's parents and the District reached an impasse as to the appropriate placement for Rachel, the parties agreed to have independent diagnostic aptitude and achievement testing performed by a state agency, the State of California Diagnostic School for Neurologically Handicapped Children (California Diagnostic Center). Following a week-long assessment of Rachel, the California Diagnostic Center's testing data indicated that Rachel did not possess the cognitive abilities to grasp a regular education curriculum, regardless of the amount of supplemental aids and services. [C.D. 31].[2] This standardized aptitude and achievement testing indicated that Rachel could only make meaningful academic progress in a special education environment, primarily because her limited cognitive skills allowed her to learn primarily by rote repetition, requiring "much repetition of an activity in order to fully master it or make her correct response automatic." *Id.*

Based on the independent aptitude and achievement testing performed by the California Diagnostic Center, as well as the

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[2] "C.D." refers to the Clerk's Docket number.

District's own experience with Rachel, the District determined that placement half-time in a regular education classroom for non-academic classes, with the remaining half-time in special education, would be the maximum appropriate level of mainstreaming for Rachel. This placement would allow Rachel to work half-day in a low student-teacher ratio environment with certified instructors trained specifically to recognize and overcome the particular cognitive obstacles created by mental retardation, in addition to allowing Rachel to obtain the socialization benefits of interacting with nondisabled peers for the remaining half of the day. The District believed that under the mainstreaming preference as it has been interpreted by the courts, this placement would strike the appropriate balance between providing educational benefit to Rachel, and doing so in the least restrictive environment. [C.D. 31].

Rachel's parents challenged the District's proposed placement by initiating an administrative hearing.[3] The hearing officer, after a lengthy administrative hearing, determined that the half-time mainstreaming program offered by the District did not comply with the federal mainstreaming requirement, and ordered that Rachel be placed within the

[3] Rachel's parents removed Rachel from the District, and enrolled her in a private school, where she attended kindergarten a second time in a regular education classroom. [C.D. 31]. Rachel has remained in a regular education class at the private school, supported by a full-time aide, since then. During the appeals, the District offered to comply with the hearing officer's order by placing Rachel in full-time regular education within the District supported by aides and supplemental services. Rachel's parents have declined, and have elected to keep Rachel at the private school.

District in a regular education first grade class for the 1990-91 school year, assisted by a one-to-one aide.

Pursuant to the IDEA, the District sought judicial review of the adverse administrative decision by filing a complaint in the United States District Court for the Eastern District.[4] After receiving cross-motions for summary judgment, the District Court ordered an evidentiary hearing. [C.D. 73]. As part of the evidence to be received, the District Court granted a motion by the District that the California Diagnostic Center be allowed to perform updated aptitude and achievement testing of Rachel, the findings to address whether she had progressed during her one-year placement in full-time regular education at the private school. [C.D. 128].

After five days of assessment and observation as to the progress, or lack thereof, during Rachel's year-long regular education placement in private school, the California Diagnostic Center's achievement testing indicated that over the year Rachel had spent repeating kindergarten she had not made measurable academic progress and had possibly regressed in some areas. [T. E. P-10].[5]

The District Court held a three-day evidentiary hearing, after which, on March 2, 1992, it affirmed the hearing officer's order in a written decision. The District Court adopted a new four-part test for evaluating whether a placement represents the

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[4] The jurisdiction of the District Court was invoked pursuant to 20 U.S.C. § 1415.

[5] "T.E. refers to the trial exhibit number.

"least restrictive environment," which new test the District Court found to support the hearing officer's order of full-time mainstreaming.

The District appealed to the Ninth Circuit. The Ninth Circuit affirmed the District Court's decision, and upheld the new least restrictive environment test adopted by the District Court, explaining:

> We have not adopted or devised a standard for determining the presence of compliance with 20 U.S.C. § 1412(5)(B). The Third, Fifth and Eleventh Circuits use what is known as the *Daniel R.R.* test. The Fourth, Sixth and Eighth Circuits apply the *Roncker* test.
>
> * * *
>
> Although the district court relied principally on *Daniel R.R.* and *Greer*, it did not specifically adopt the *Daniel R.R.* test over the *Roncker* test. Rather, it employed factors found in both lines of cases in its analysis. The result was a four factor balancing test in which the court considered (1) the educational benefits of placement full-time in a regular class; (2) the non-academic benefits of such placement; (3) the effect Rachel had on the teacher and children in the regular class, and (4) the costs of mainstreaming Rachel. This analysis directly addresses the issue of the appropriate placement for a child with disabilities under the requirements of 20 U.S.C. § 1412(5)(b). Accordingly,

> we approve and adopt the test employed by the district court. Ninth Circuit Decision, *infra*, pp. 20-21a.

The Ninth Circuit therefore acknowledged its adoption of a new test, further enlarging the split which had already existed between the other Circuits.

Although the Ninth Circuit test appears reasonable on its face, the practical effect of the Ninth Circuit's new standard is to require a school district to categorically place its disabled children full-time in regular education, even if all indications suggest that particular children cannot progress in regular education. Only after until an exhaustive record of failure has been developed to indicate that no possible supplemental aid or service can make the regular education placements suitable for these children, can thedistrict implement the appropriate mixed placement. Congress never intended to impose such a burden on disabled children or school districts. The Ninth Circuit's new test defeats the congressional intent in adopting the IDEA, and given its divergence from those tests in place in the other Circuits, throws educators and courts throughout the nation into a state of confusion as to whether they can ever prescribe a mixed educational placement, without first subjecting a disabled child to extended, painful and embarrassing failure within a full-time regular education environment.

REASONS FOR GRANTING THE WRIT

I

The Ninth Circuit's Addition Of A New Test For The Mainstreaming Preference Creates A Three-Way Split Among The Circuits: A Child's Federal Right To A Least Restrictive Environment Should Not Vary Depending On The Circuit In Which That Child Resides

Prior to the Ninth Circuit's decision, the federal Circuits had split equally between two prevailing tests utilized to evaluate mainstreaming requirements, the *Daniel R.R.* and the *Roncker* tests. The Ninth Circuit's decision acknowledges that its new "balancing test" represents a departure from these already divergent tests. This split in authorities among the federal Circuits creates a chaotic situation where educators, as well as the lower courts throughout the nation, are left with little direction as to how to implement the federal mainstreaming preference.

The Fourth, Sixth and Eighth Circuits apply the *Roncker* test. Under this test, which was first articulated by the Sixth Circuit in *Roncker v. Walter*, 700 F.2d 1058, 1063 (6th Cir. 1983):

> [t]he proper inquiry is whether a proposed placement is appropriate under the Act * * * In a case where the segregated facility is considered superior, the court should determine whether the services which make that placement superior could be feasibly provided in a non-segregated setting. If they can, the placement in the segregated school would be inappropriate under the Act.

Thus, under the *Ronker* test, the focus is on whether the special education services necessary to provide an appropriate education to a particular disabled child can, as a practical matter, be provided within a regular education setting. If not, then reasonable limitations on the extent of a child's level of mainstreaming are appropriate.

The Third, Fifth and Eleventh Circuits employ the *Daniel R.R.* test, which sets forth a series of tangible limits on the appropriateness of regular education for a disabled child:[6] (1) if the child does not have the cognitive ability to grasp the essential elements of the regular education curriculum, regular

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[6] In departing from the *Ronker* test, the Fifth Circuit explained:

> We respectfully decline to follow the Sixth Circuit's analysis [in *Roncker*]. Certainly, the *Roncker* test accounts for factors that are important in any mainstreaming case. We believe, however, that the test necessitates too intrusive an inquiry into the educational policy choices that Congress deliberately left to state and local school officials. *Daniel R.R. v. State Board of Education, 874 F.2d 1036, 1046 (1989).*

education is not appropriate; (2) if the regular education curriculum would have to be "modified beyond recognition" for the disabled child in order to be understood by that child, thereby creating a special education class within a regular education class, regular education is not appropriate; (3) if the child would require the regular education teacher or aide to devote most or all of their time to the detriment of others, regular education is not appropriate; and (4) if the only benefit from regular education would be that the child is sitting next to a non-handicapped student, regular education is not appropriate. *Daniel R.R., supra, 874 F.2d* at 1046-1049.

The Ninth Circuit's new test departs from the *Roncker* and *Daniel R.R.* tests, by establishing a new:

> four factor balancing test in which [the court considers] (1) the educational benefits of placement full-time in a regular class; (2) the non-academic benefits of such placement; (3) the effect [the child] had on the teacher and children in the regular class, and (4) the costs of mainstreaming [the child].

This Ninth Circuit's test differs significantly in its analytic approach from those contained in the *Roncker* and *Daniel R.R.* decisions.[7] The *Ronker* and *Daniel R.R.* each identify tangible

[7] The Ninth Circuit's also departs from the *Daniel R.R.* test as to the extent to which curriculum modification should enter into the balance. *Daniel R.R.* explained that the mainstreaming preference would be overcome if the teacher had to alter "90 to 100 percent of the curriculum to tailor it to Daniel's abilities. Such an effort would modify the curriculum beyond recognition, an effort which we will not require in the name of

limits on the mainstreaming preference. The Ninth Circuit's test does not, but rather identifies four factors that are to be "balanced" before making a placement decision. In practical terms, the Ninth Circuit's new test is therefore less practical as a tool for guiding educators through daily placement decisions.

Congress has recognized that more than eight million children with disabilities live in the United States today. 20 U.S.C. § 1400, *infra* p. 1a. The rights of these children to a free and appropriate education in the least restrictive environment should not vary depending on the Circuit in which they reside. As is reflected by the several petitions for certiorari submitted to this Court in recent years on the subject,[8] educators and parents with disabled children are confused and concerned by the lack of consistent guidance emanating from the various Circuit Courts of Appeal. Now, with the Ninth Circuit's introduction of a third separate and divergent test for evaluating the mainstreaming preference, the

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mainstreaming." *Id.* at 1050. The Ninth Circuit's new test rejects this tangible limit for determining whether a full-time mainstreaming placement is appropriate; the District Court explains that "even dramatic modification, has no significance in and of itself." District Court Decision, *infra* p. 36a.

[8] *See e.g., Roncker v. Walter*, 700 F.2d 1058 (6th Cir.), *cert. denied*, 464 U.S. 864, 104 S. Ct. 196, 78 L. Ed. 2d 171 (1983); *A.W. v. Northwest R-1 School District*, 813 F.2d 158, 162 (8th Cir.), *cert. denied*, 484 U.S. 847, 108 S. Ct. 144, 98 L. Ed. 2d 100 (1987); *Lachman v. Illinois State Board of Education*, 852 F.2d 290, 295 (7th Cir.), *cert. denied*, 488 U.S. 925, 109 S. Ct. 308, 102 L. Ed. 2d 327 (1988); *Roland v. Concord School Comm.*, 910 F.2d 983, 993 (1st Cir. 1990), *cert. denied*, 113 L. Ed. 2d 230, 111 S. Ct. 1122 (1991); *Barnett v. Fairfax County Sch. Bd.*, 927 F.2d 146, 153-54 (4th Cir.), *cert. denied*, 112 S. Ct. 175, 116 L. Ed. 2d 138 (1991).

time has come for this Court to provide a definitive standard for the federal mainstreaming rights of disabled children.

II

The Ninth Circuit Decision Conflicts With The IDEA's Requirement That The Appropriateness Of An Educational Placement Be Determined By Measurable, Verifiable Academic Progress

The Ninth Circuit's decision generates confusion in all Circuits as to how an educator is to determine whether full-time mainstreaming is appropriate. On the one hand, federal law mandates that IDEA placement decisions be guided by standardized "aptitude and achievement tests," which must be interpreted by persons "knowledgeable about * * * the meaning of the valuation data." 34 C.F.R. § 300.533(a)(1) and (3) and comment, *infra*, p. 7a. On the other hand, the Ninth Circuit's holding indicates that it was improper for the District in this case to base its placement decision on standardized aptitude or achievement testing because these tests embody an "educational philosophy" that focuses on a child's "limitations," and therefore are not consistent with the mainstreaming preference. Ninth Circuit Decision, *infra*, p. 22a (accepting findings of District Court); District Court Decision, *infra*, pp. 38a-39a. The Ninth Circuit's rejection of standardized aptitude and achievement testing as a method of evaluating placement appropriateness not only violates the

express provisions of IDEA's implementing regulations, but as a practical matter, leaves educators with only one objective method for determining that a full-time regular education placement might be inappropriate: subjecting the disabled child to repeated failure until such time as a record has been established that no amount of supplement aids or services will allow the child to achieve educational benefit from full-time regular education.

Rachel Holland was given standardized aptitude and achievement tests on two occasions relating to her IDEA placement.

In 1989, when attempting to determine an appropriate placement for Rachel, Rachel's parents and the District agreed to have aptitude and achievement tests administered by an independent state agency, the California Diagnostic Center.[9] The resulting validated test data, as interpreted by the diagnostic staff at the state agency, indicated that due to her particular learning disabilities, Rachel could only make meaningful educational progress if she attended a special day class that was specifically tailored to address her specific learning deficits. [C.D. 31].

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[9] The Ninth Circuit characterizes the diagnostic professionals from the California Diagnostic Center as "the District's experts." Ninth Circuit Decision, *infra*, p. 13a. Neither lower court mentions that the California Diagnostic Center is an independent state agency that performed the standardized testing under an agreement between Rachel's parents and the District. Likewise, neither court mentions that federal regulations require such testing to be a guiding factor in placement decisions. 34 C.F.R. Pt. 300.533, *infra*, p. 7a.

In 1991, during the course of the underlying litigation in the District Court, the District sought court permission for the independent state testing agency to again test Rachel following her year-long full-time regular education placement at private school. The District Court granted the District's motion, and the resulting standardized testing data indicated that during Rachel's experience with full-time mainstreaming, Rachel had not made measurable academic progress. [T.E. P-10].

Both the District Court and the Ninth Circuit expressly discounted the findings of the California Diagnostic Center, characterizing them as evidence from the District's "expert witnesses" whose standardized testing techniques were biased by their "educational philosophy." Referring to the state agency's achievement test data, the District Court explained:

> The bulk of the evidence presented by the District related to Rachel's performance on achievement and aptitude testing conducted by the California Diagnostic Center, and observation of Rachel at school by members of the Diagnostic Center team that tested Rachel. According to the Diagnostic Center witnesses, Rachel has made no progress toward her 1990 IEP goals and derives little academic benefit from regular class placement. These witnesses further suggest that supplemental aids and services are ineffective. District Court Decision, *infra*, p. 38a.

The District Court explained further:

> It is evident that the contrary assessments of Rachel's academic progress are founded in conflicting educational philosophies. The Diagnostic Center witnesses do not believe that a child with Rachel's I.Q. can be effectively educated in a regular classroom. They believe that Rachel's education at this point should focus on functional skills, such as handling money, doing laundry, and using public transportation. District Court Decision, *infra*, p. 39a.

Petitioner recognizes that a lower court's findings of fact, whereby a such a court accepts one form of evidence over another, generally are not considered to be of sufficient national importance to warrant this Court's review.[10] However, in this case, the lower courts' explicit rejection of all independent aptitude and achievement test data on the basis that such standardized data represents an educational philosophy contrary to mainstreaming, creates a new standard which directly conflicts with the IDEA's mandatory procedures for determining appropriate placements.

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[10] The Hollands presented several witnesses who testified that, based on their observations, they felt Rachel was or would be making progress in a regular education environment. However, the Hollands produced no verifiable data to support that Rachel had made measurable academic progress. The Hollands likewise produced no witnesses to "re-evaluate" the validated testing data obtained by the California Diagnostic Center.

III.

The Ninth Circuit's New Test, Which Requires Placement Full-Time In Regular Education Even If Such Placement Will Negatively Impact A Disabled Child's Educational Progress, Is Inconsistent With IDEA's Principal Goal Of "Assuring The Effectiveness Of Efforts To Educate Children With Disabilities"

The first two steps in the Ninth Circuit's balancing test are to compare the academic as well as nonacademic (socialization) benefits (or detriments) of full-time regular education versus a proposed alternative placement. However, the two lower courts make clear that under the test, the disabled child's socialization is more important than her education. The District Court explains:

> the Act's requirement of integration, based on recognition of the non-academic value of such integration, is not overcome by a showing that a special education placement may be academically superior to placement in a regular classroom. [Citations]. The Act's presumption in favor of mainstreaming requires that a handicapped child be educated in a regular classroom if the child can receive a satisfactory education there, even if it is not the best academic

> setting for that child. [Citations]. District Court Decision, *infra*, pp. 33a-34a.

The Ninth Circuit's new test provides no meaningful guidance for determining what a "satisfactory" level of academic benefit is. It is clear from the lower courts' analyses that a "satisfactory" level of educational benefit is something less than the educational benefit a disabled child might obtain from a special education class. Yet the Ninth Circuit's test provides no guidance as to how much less educational benefit can be provided in a regular education environment as opposed to that which would otherwise be afforded through a mixed environment involving some special education.

The fact that the Ninth Circuit's new test provides no guidance is itself problematic, as it leaves educators with no tangible standard upon which to make a placement decision. More striking is the fact that the Ninth Circuit's elevation of mainstreaming over a subordinate goal of academic benefit is flatly inconsistent with the IDEA. In adopting the IDEA, Congress specifically identified the purpose of the Act as follows:

> (9) it is in the national interest that the Federal Government assist State and local efforts *to provide programs to meet the educational needs of children with disabilities in order to assure equal protection of the law*.

(c) Purpose. It is the purpose of this Act to assure that all children with disabilities have available to them, within the time periods specified in section 612(2)(B), a free appropriate public education *which emphasizes special education and related services designed to meet their unique needs*, to assure that the rights of children with disabilities and their parents or guardians are protected, to assist States and localities to provide for the education of all children with disabilities, and to assess and *assure the effectiveness of efforts to educate children with disabilities*. 20 U.S.C. § 1400(b)(9) and (c), *infra*, p. 2a. [Emphasis added].

The IDEA itself thus provides a tangible and workable limit at which point a full-time regular education placement is no longer appropriate for a disabled child. By expressly identifying the limitation that children be mainstreamed into regular education only "to the maximum extent appropriate," and by identifying the purpose for enacting the IDEA to be to "assure the effectiveness of efforts to educate children with disabilities," Congress has set forth a very tangible limit on the mainstreaming preference: at the point where a full-time regular education placement would impede a disabled child's opportunity for educational progress, full-time regular education is no longer appropriate.

The Ninth Circuit's elevation of the mainstreaming preference over the IDEA's requirement for provision of a meaningful education to disabled children is a step other

Circuits have not been willing to take. As the Fifth Circuit in *Daniel R.R., supra, 874 F.2d* at 1046-1049, explained:

> [t]he Act's mandate for a free appropriate public education qualifies and limits its mandate for education in the regular classroom. Schools must provide a free appropriate public education and must do so, to the maximum extent appropriate, in regular education classrooms. But when education in a regular classroom cannot meet the handicapped child's unique needs, the presumption in favor of mainstreaming is overcome and the school need not place the child in regular education.

See also, Lachman v. Illinois State Board of Education, 852 F.2d 290, 295 (7th Cir. 1988)(the "laudable policy objective [of mainstreaming] must be weighed in tandem with the Act's principal goal of ensuring that the public schools provide handicapped children with a free appropriate public education"); *Roland M. v. Concord School Committee*, 910 F.2d 983, 993 (1st Cir. 1990)("the desirability of mainstreaming must be weighed in concert with the Act's mandate for educational improvement.)"

Nowhere in the IDEA is there any support for the educational double standard adopted by the Ninth Circuit. The Ninth Circuit's test creates, in effect, a parallel educational system: while educators are to maximize the educational potential of nondisabled students, they need only provide a

"satisfactory" educational benefit to their disabled peers. The mainstreaming preference was never meant to relegate disabled children to a second class education. It was enacted explicitly to promote the "effectiveness of efforts to educate children with disabilities." The Ninth Circuit's new test is simply skewed too far in favor of categorical full-time regular education placement to comply with IDEA's mandate that disabled children be assured a meaningful opportunity for educational progress.

CONCLUSION

For the above reasons, and in consideration of the importance of the matters at issue, the petitioner respectfully urges this Court to grant the writ of certiorari.

Respectfully submitted,

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APPENDIX A — 20 U.S.C. § 1400.

Congressional statements and declarations

(a) Short title. This title may be cited as the "Individuals with Disabilities Education Act".

(b) Findings. The Congress finds that --

(1) there are more than eight million children with disabilities in the United States today;

(2) the special educational needs of such children are not being fully met;

(3) more than half of the children with disabilities in the United States do not receive appropriate educational services which would enable them to have full equality of opportunity;

(4) one million of the children with disabilities in the United States are excluded entirely from the public school system and will not go through the educational process with their peers;

(5) there are many children with disabilities throughout the United States participating in regular school programs whose disabilities prevent them from having a successful educational experience because their disabilities are undetected;

(6) because of the lack of adequate services within the public school system, families are often forced to find services outside the public school system, often at great distance from their residence and at their own expense;

(7) developments in the training of teachers and in diagnostic and instructional procedures and methods have advanced to the point that, given appropriate funding, State and

local educational agencies can and will provide effective special education and related services to meet the needs of children with disabilities;

(8) State and local educational agencies have a responsibility to provide education for all children with disabilities, but present financial resources are inadequate to meet the special educational needs of children with disabilities; and

(9) it is in the national interest that the Federal Government assist State and local efforts to provide programs to meet the educational needs of children with disabilities in order to assure equal protection of the law.

(c) Purpose. It is the purpose of this Act to assure that all children with disabilities have available to them, within the time periods specified in section 612(2)(B) [20 USCS § 1412(2)(B)], a free appropriate public education which emphasizes special education and related services designed to meet their unique needs, to assure that the rights of children with disabilities and their parents or guardians are protected, to assist States and localities to provide for the education of all children with disabilities, and to assess and assure the effectiveness of efforts to educate children with disabilities.

APPENDIX B — 20 U.S.C. § 1412

Eligibility requirements

In order to qualify for assistance under this part in any fiscal year, a State shall demonstrate to the Secretary that the following conditions are met:

* * *

(5) The State has established

* * *

(B) procedures to assure that, to the maximum extent appropriate, children with disabilities, including children in public or private institutions or other care facilities, are educated with children who are not disabled, and that special classes, separate schooling, or other removal of children with disabilities from the regular educational environment occurs only when the nature or severity of the disability is such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily, and

* * *

APPENDIX C — 20 USC § 1413.

State plans

(a) Requisite features. Any State meeting the eligibility requirements set forth in section 612 [20 USCS § 1412] and desiring to participate in the program under this part shall submit to the Secretary, through its State educational agency, a State plan at such time, in such manner, and containing or accompanied by such information, as the Secretary deems necessary. Each such plan shall --

* * *

(2) provide that programs and procedures will be established to assure that funds received by the State or any of its political subdivisions under any other Federal program, including subpart 2 of part D of chapter 1 of title I of the Elementary and Secondary Education Act of 1965 [20 USCS §§ 2791 et seq.], under which there is specific authority for the provision of assistance for the education of children with disabilities, will be utilized by the State, or any of its political subdivisions, only in a manner consistent with the goal of providing a free appropriate public education for all children with disabilities, except that nothing in this clause shall be construed to limit the specific requirements of the laws governing such Federal programs;

* * *

APPENDIX D — 34 C.F.R. 300.532 EVALUATION PROCEDURES.

State educational agencies and LEAs shall ensure, at a minimum, that:

(a) Tests and other evaluation materials --

(1) Are provided and administered in the child's native language or other mode of communication, unless it is clearly not feasible to do so;

(2) Have been validated for the specific purpose for which they are used; and

(3) Are administered by trained personnel in conformance with the instructions provided by their producer.

(b) Tests and other evaluation materials include those tailored to assess specific areas of educational need and not merely those that are designed to provide a single general intelligence quotient.

(c) Tests are selected and administered so as best to ensure that when a test is administered to a child with impaired sensory, manual, or speaking skills, the test results accurately reflect the child's aptitude or achievement level or whatever other factors the test purports to measure, rather than reflecting the child's impaired sensory, manual, or speaking skills (except where those skills are the factors that the test purports to measure).

(d) No single procedure is used as the sole criterion for determining an appropriate educational program for a child.

(e) The evaluation is made by a multidisciplinary team or group of persons, including at least one teacher or other specialist with knowledge in the area of suspected disability.

(f) The child is assessed in all areas related to the suspected disability, including, if appropriate, health, vision, hearing, social and emotional status, general intelligence, academic performance, communicative status, and motor abilities.

APPENDIX E — 34 C.F.R. 300.533 PLACEMENT PROCEDURES.

(a) In interpreting evaluation data and in making placement decisions, each public agency shall --

(1) Draw upon information from a variety of sources, including aptitude and achievement tests, teacher recommendations, physical condition, social or cultural background, and adaptive behavior;

(2) Ensure that information obtained from all of these sources is documented and carefully considered;

(3) Ensure that the placement decision is made by a group of persons, including persons knowledgeable about the child, the meaning of the evaluation data, and the placement options; and

(4) Ensure that the placement decision is made in conformity with the LRE rules in §§ 300.550-300.554.

(b) If a determination is made that a child has a disability and needs special education and related services, an IEP must be developed for the child in accordance with §§ 300.340-300.350.

NOTE: Paragraph (a)(1) of this section includes a list of examples of sources that may be used by a public agency in making placement decisions. The agency would not have to use all the sources in every instance. The point of the requirement is to ensure that more that one source is used in interpreting evaluation data an din making placement decisions. For

example, while all of the named sources would have to be used for a child whose suspected disability is mental retardation, they would not be necessary for certain other children with disabilities, such as a child who has a severe articulation impairment as his primary disability. For such a child, the speech-language pathologist, in complying with the multiple source requirement, might use;

(1) A standardized test of articulation, and

(2) observation of the child's articulation behavior in conversational speech.

APPENDIX F — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT FILED JANUARY 24, 1994

SACRAMENTO CITY UNIFIED SCHOOL DISTRICT, BOARD OF EDUCATION, Plaintiff-Appellant, v. RACHEL H., by and through her guardian ad litem, ROBERT HOLLAND; WILLIAM HONIG, CALIFORNIA STATE SUPERINTENDENT OF PUBLIC INSTRUCTION; CALIFORNIA STATE DEPARTMENT OF EDUCATION HEARING OFFICE, McGEORGE SCHOOL OF LAW; and MARY COTE, HEARING OFFICER, Defendants-Appellees.

SACRAMENTO CITY UNIFIED SCH. DIST. v. RACHEL H.
No. 92-15608
UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT
14 F.3d 1398

Argued and Submitted
August 12, 1993—San Francisco, California
Filed January 24, 1994

PRIOR HISTORY: Appeal from the United States District Court for the Eastern District of California. D.C. No. CV-90-01171-DFL. David F. Levi, District Judge, Presiding.

JUDGES: Before: Joseph T. Sneed, Cecil F. Poole, and Stephen S. Trott, Circuit Judges.

Appendix F

OPINION

SNEED, Circuit Judge:

The Sacramento Unified School District ("the District") timely appeals the district court's judgment in favor of Rachel Holland ("Rachel") and the California State Department of Education. The court found that the appropriate placement for Rachel under the Individuals with Disabilities Act ("IDEA") was full-time in a regular second grade classroom with some supplemental services. The District contends that the appropriate placement for Rachel is half-time in special education classes and half-time in a regular class. We affirm the judgment of the district court.

I.

FACTS AND PRIOR PROCEEDINGS [1]

Rachel Holland is now 11 years old and is moderately mentally retarded. She was tested with an I.Q. of 44. She attended a variety of special education programs in the District from 1985-89. Her parents sought to increase the time Rachel spent in a regular classroom, and in the fall of 1989, they requested that Rachel be placed full-time in a regular classroom for the 1989-90 school year. The District rejected their request and proposed a placement that would have divided Rachel's time between a special education class for academic subjects

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[1] The district court's opinion is reported in Board of Ed. v. Holland, 786 F. Supp. 874 (E.D. Cal. 1992).

and a regular class for non-academic activities such as art, music, lunch, and recess. The district court found that this plan would have required moving Rachel at least 6 times each day between the two classrooms. Holland, 786 F. Supp. at 876. The Hollands instead enrolled Rachel in a regular kindergarten class at the Shalom School, a private school. Rachel remained at the Shalom School in regular classes and at the time the district court rendered its opinion, was in the second grade.

The Hollands and the District were able to agree on an Individualized Education Program ("IEP")[2] for Rachel. Although the IEP is required to be reviewed annually, see 20 U.S.C. § 1401(20)(B), because of the dispute between the parties, Rachel's IEP has not been reviewed since January 1990.[3]

The Hollands appealed the District's placement decision to a state hearing officer pursuant to 20 U.S.C. § 1415(b)(2). They maintained that Rachel best learned social and academic skills in a regular classroom and would not benefit from being in a special education class. The District contended Rachel was

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[2]An IEP is prepared for each child eligible for special education at a meeting between a representative from the school district, the child's teacher, and the child's parents. Board of Educ. v. Rowley, 458 U.S. 176, 182, 73 L. Ed. 2d 690, 102 S. Ct. 3034 (1982). The purpose of the IEP is to tailor the child's education to her individual needs. Id. at 181.

[3]The 1990 IEP objectives include: speaking in 4 or 5 word sentences; repeating instructions of complex tasks; initiating and terminating conversations; stating her name, address and phone number; participating in a safety program with classmates; developing a 24 word sight vocabulary; counting to 25; printing her first and last names and the alphabet; playing cooperatively; participating in lunch without supervision; and identifying upper and lower case letters and the sounds associated with them.

too severely disabled to benefit from full-time placement in a regular class. The hearing officer concluded that the District had failed to make an adequate effort to educate Rachel in a regular class pursuant to the IDEA. The officer found that (1) Rachel had benefited from her regular kindergarten class - that she was motivated to learn and learned by imitation and modeling; (2) Rachel was not disruptive in a regular classroom; and (3) the District had overstated the cost of putting Rachel in regular education - that the cost would not be so great that it weighed against placing her in a regular classroom. The hearing officer ordered the District to place Rachel in a regular classroom with support services, including a special education consultant and a part-time aide.

The District appealed this determination to the district court. Pursuant to 20 U.S.C. §§ 1415(e)(2), the parties presented additional evidence at an evidentiary hearing. The court affirmed the decision of the hearing officer that Rachel should be placed full-time in a regular classroom.

In considering whether the District proposed an appropriate placement for Rachel, the district court examined the following factors: (1) the educational benefits available to Rachel in a regular classroom, supplemented with appropriate aids and services, as compared with the educational benefits of a special education classroom; (2) the non-academic benefits of interaction with children who were not disabled; (3) the effect of Rachel's presence on the teacher and other children in the classroom; and (4) the cost of mainstreaming Rachel in a regular classroom.

1. Educational Benefits

The district court found the first factor, educational benefits to Rachel, weighed in favor of placing her in a regular classroom. Each side presented expert testimony which is summarized in the margin.[4] The court noted that the District's evidence focused on Rachel's limitations, but did not establish that the educational opportunities available through special education were better or equal to those available in a regular classroom. Moreover, the court found that the testimony of the Hollands' experts was more credible because they had more background in evaluating children with disabilities placed in regular classrooms, and they had a greater opportunity to observe Rachel over an extended period of time in normal circumstances. The district court also gave great weight to the testimony of Rachel's current teacher, Nina Crone, who the court found to be an experienced, skillful teacher. Ms. Crone stated that Rachel was a full member of the class and participated in all activities. Ms. Crone testified that Rachel was making progress on her IEP goals - that Rachel was learning one-to-one correspondence in counting, could recite the English and Hebrew alphabets, and that her communication abilities and sentence lengths were also improving.

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[4]The Hollands' experts testified Rachel had made significant strides at the Shalom School, and suggested that her motivation stemmed from her regular classroom placement. They stated Rachel was learning language and other skills from modeling the behavior of the other students. The District's experts, from the state Diagnostic Center, testified that Rachel had made little progress toward her IEP goals, derived little benefit from regular class placement and suggested supplementary aids would be ineffective.

The district court found that Rachel received substantial benefits in regular education and that all of her IEP goals could be implemented in a regular classroom with some modification to the curriculum and with the assistance of a part-time aide.

2. Non-academic Benefits

The district court next found that the second factor, non-academic benefits to Rachel, also weighed in favor of placing her in a regular classroom. The court noted that the Hollands' evidence indicated that Rachel had developed her social and communications skills as well as her self-confidence from placement in a regular class, while the District's evidence tended to show that Rachel was not learning from exposure to other children and that she was isolated from her classmates. The court concluded that the differing evaluations in large part reflected the predisposition of the evaluators. The court found the testimony of Rachel's mother and her current teacher to be the most credible. These witnesses testified regarding Rachel's excitement about school, learning, and her new friendships, and Rachel's improved self-confidence.

3. Effect on the Teacher and Children in the Regular Class

The district court next addressed the issue of whether Rachel had a detrimental effect on others in her regular classroom. The court looked at two aspects, (1) whether there was detriment because the child was disruptive, distracting or unruly, and (2) whether the child would take up so much of the teacher's time that the other students would suffer from lack of attention. The witnesses of both parties agreed that Rachel followed directions, was well-behaved and not a distraction in

class. The court found the most germane evidence on the second aspect came from Rachel's second grade teacher, Nina Crone, who testified that Rachel did not interfere with her ability to teach the other children and in the future would require only a part-time aide. Accordingly, the district court determined that the third factor weighed in favor of placing Rachel in a regular classroom.

4. Cost

Finally, the district court found that the District had not offered any persuasive or credible evidence to support its claim that educating Rachel in a regular classroom with appropriate services would be significantly more expensive than educating her in the District's proposed setting.

The District contended that it would cost $ 109,000 to educate Rachel full-time in a regular classroom. This figure was based on a full-time aide for Rachel and an estimate that it would cost over $ 80,000 to provide school-wide sensitivity training. The court found that the District did not establish that such training was necessary, and if it was, the court noted that there was evidence from the California Department of Education that the training could be had at no cost. Moreover, the court found it would be inappropriate to assign the total cost of the training to Rachel when other children with disabilities would benefit. In addition, the court concluded that the evidence did not suggest that Rachel required a full-time aide.

In addition, the court found that the comparison should have been between, on the one hand, the cost of placing Rachel

in a special class with a full-time special education teacher and two full-time aides with approximately 11 other children, and, on the other hand, the cost of placing her in a regular class with a part-time aide. It noted, however, that the District had provided no evidence of this cost comparison.

The court also was not persuaded by the District's argument that it would lose significant funding if Rachel did not spend at least 51% of her time in a special education class. The court noted that a witness from the California Department of Education testified that waivers were available if a school district sought to adopt a program that did not fit neatly within the funding guidelines. The District had not applied for a waiver, however.

Thus, by inflating the cost estimates and failing to address the true comparison, the District did not meet its burden of proving that regular placement would burden the District's funds or adversely affect services available to other children. Therefore, the court found that the cost factor did not weigh against mainstreaming Rachel.

The district court concluded that the appropriate placement for Rachel was full-time in a regular second grade classroom with some supplemental services and affirmed the decision of the hearing officer.

II.

JURISDICTION

The district court had jurisdiction pursuant to 20 U.S.C. § 1415(e)(2). We have jurisdiction pursuant to 28 U.S.C. § 1291.

III.
STANDARDS OF REVIEW

The appropriateness of a special education placement under the IDEA is reviewed de novo. W.G. v. Bd. of Trustees, 960 F.2d 1479, 1483 (9th Cir. 1992); Gregory K. v. Longview Sch. Dist., 811 F.2d 1307, 1314 (9th Cir. 1987). The district court's findings of fact are reviewed for clear error. Ash v. Lake Oswego Sch. Dist., 980 F.2d 585, 588 (9th Cir. 1992); W.G. v. Bd., 960 F.2d at 1483. The clearly erroneous standard applies to the district court's factual determinations regarding (1) whether Rachel was receiving academic and non-academic benefits in the regular classroom; (2) whether her presence was a detriment to others in the classroom; and (3) whether the District demonstrated that the cost of placing her in a regular classroom would be significantly more expensive. See Ash, 980 F.2d at 588 (district court's factual determination that student was incapable of deriving educational benefit outside of residential placement is reviewed for clear error); see also Daniel R.R. v. State Bd. of Educ., 874 F.2d 1036, 1048 (5th Cir. 1989) (whether education in the regular classroom, with supplemental aids and services, can be achieved satisfactorily is an "individualized, fact specific inquiry").

IV.
DISCUSSION

A. Mootness

It has been over a year since the district court rendered its decision. The court concluded that the appropriate placement at

that time was full-time in a regular classroom. It noted that Rachel and the educational demands on her may change, and the IDEA had foreseen such changes in providing for an annual IEP review.

This court cannot determine what would be the appropriate placement for Rachel at the present time. However, we conclude that this case presents a live controversy, because the conduct giving rise to the suit is capable of repetition, yet evading review. See Honig v. Doe, 484 U.S. 305, 318, 98 L. Ed. 2d 686, 108 S. Ct. 592 (1988); Daniel R.R., 874 F.2d at 1040. As the district court noted, the District and the Hollands have conflicting educational philosophies and perceptions of the District's mainstreaming obligation. The District has consistently taken the view that a child with Rachel's I.Q. is too severely disabled to benefit from full-time placement in a regular class, [*13] while the Hollands maintain that Rachel learns both social and academic skills in a regular class and would not benefit from being in a special education class. This conflict is a continuing one and will arise frequently. See Holland, 786 F. Supp. at 877 n.4. Moreover, it is likely to evade review since the nine month school year will not provide enough time for judicial review. See Board of Educ. v. Rowley, 458 U.S. 176, 186-87 n.9, 73 L. Ed. 2d 690, 102 S. Ct. 3034 (1982); Daniel R.R., 874 F.2d at 1041.

B. Mainstreaming Requirements of the IDEA

1. The Statute

The IDEA provides that each state must establish:

> [P]rocedures to assure that, to the maximum extent appropriate, children with disabilities . . . are educated with children who are not disabled, and that special classes, separate schooling, or other removal of children with disabilities from the regular educational environment occurs only when the nature or severity of the disability is such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily . . . .

20 U.S.C. § 1412(5)(B).

This provision sets forth Congress's preference for educating children with disabilities in regular classrooms with their peers. Department of Educ. v. Katherine D., 727 F.2d 809, 817 (9th Cir. 1983), cert. denied, 471 U.S. 1117, 86 L. Ed. 2d 260, 105 S. Ct. 2360 (1985); see also Oberti v. Bd. of Educ., 995 F.2d 1204 (3d Cir. 1993) (as corrected, Jun. 23, 1993); Greer v. Rome City Sch. Dist., 950 F.2d 688, 695 (11th Cir. 1991), withdrawn, 956 F.2d 1025 (1992), reinstated, 967 F.2d 470 (1992); Daniel R.R., 874 F.2d at 1044.

2. Burden of Proof

There is a conflict regarding which party bears the burden of proof. The Third Circuit has held that a school district has the initial burden of justifying its educational placement at the administrative level and the burden in the district court if the student is challenging the agency decision. See Oberti, No. 92-5462 at 28. Other circuits have held that the burden of proof in the district court rests with the party challenging the agency decision. See Roland M. v. Concord Sch. Comm., 910 F.2d

983, 991 (1st Cir. 1990), cert. denied, 499 U.S. 912, 111 S. Ct. 1122, 113 L. Ed. 2d 230 (1991); Kerkam v. McKenzie, 274 U.S. App. D.C. 139, 862 F.2d 884, 887 (D.C. Cir. 1988). Under either approach, in this case the District, which was challenging the agency decision, had the burden of demonstrating in the district court that its proposed placement provided mainstreaming to "the maximum extent appropriate."

3. Test for Determining Compliance with the IDEA's Mainstreaming Requirement

We have not adopted or devised a standard for determining the presence of compliance with 20 U.S.C. § 1412(5)(B). The Third, Fifth and Eleventh Circuits use what is known as the Daniel R.R. test. Oberti, No. 92-5462 at 19-20; Greer, 950 F.2d at 696; Daniel R.R., 874 F.2d at 1048.[5] The Fourth, Sixth and

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[5]First, the court must determine "whether education in the regular classroom, with the use of supplemental aids and services, can be achieved satisfactorily . . . ." Daniel R.R., 874 F.2d at 1048. If the court finds that education cannot be achieved satisfactorily in the regular classroom, then it must decide "whether the school has mainstreamed the child to the maximum extent appropriate." Id. Factors the courts consider in applying the first prong of this test are (1) the steps the school district has taken to accommodate the child in a regular classroom; (2) whether the child will receive an educational benefit from regular education; (3) the child's overall educational experience in regular education; and (4) the effect the disabled child's presence has on the regular classroom. Daniel R.R., 874 F.2d 1036 at 1048; see also Oberti, No. 92-5462 at 20-24; Greer, 950 F.2d at 696-97. In Greer the court added the factor of cost, stating that "if the cost of educating a handicapped child in a regular classroom is so great that it would significantly impact upon the education of other children in the district, then education in a regular classroom is not appropriate." 950 F.2d at 697. Regarding the second factor, the Oberti and Greer courts compared the educational benefits received in a regular classroom with the benefits received in a special education class. Oberti, No. 92-5462 at 22; Greer, 950 F.2d at 697.

Eighth Circuits apply the Roncker test. Devries v. Fairfax County Sch. Bd., 882 F.2d 876, 879 (4th Cir. 1989); A.W. v. Northwest R-1 Sch. Dist., 813 F.2d 158, 163 [*16] (8th Cir.), cert. denied, 484 U.S. 847 (1987); Roncker v. Walter, 700 F.2d 1058, 1063 (6th Cir.) cert. denied, 464 U.S. 864, 98 L. Ed. 2d 100, 108 S. Ct. 144 (1983).[6]

Although the district court relied principally on Daniel R.R. and Greer, it did not specifically adopt the Daniel R.R. test over the Roncker test. Rather, it employed factors found in both lines of cases in its analysis. The result was a four factor balancing test in which the court considered (1) the educational benefits of placement full-time in a regular class; (2) the non-academic benefits of such placement; (3) the effect Rachel had on the teacher and children in the regular class, and (4) the costs of mainstreaming Rachel. This analysis directly addresses the issue of the appropriate placement for a child with disabilities under the requirements of 20 U.S.C. § 1412(5)(b). Accordingly, we approve and adopt the test employed by the district court.

4. The District's Contentions on Appeal

The District strenuously disagrees with the district court's findings that Rachel was receiving academic and non-academic

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[6]According to the court in Roncker: "Where the segregated facility is considered superior, the court should determine whether the services which make that placement superior could be feasibly provided in a non-segregated setting. If they can, the placement in the segregated school would be inappropriate under the Act." 700 F.2d at 1063. Courts are to (1) compare the benefits the child would receive in special education with those she would receive in regular education; (2) consider whether the child would be disruptive in the non-segregated setting, and (3) consider the cost of mainstreaming. Id.

benefits in a regular class and did not have a detrimental effect on the teacher or other students. It argues that the court's findings were contrary to the evidence of the state Diagnostic Center, and that the court should not have been persuaded by the testimony of Rachel's teacher, particularly her testimony that Rachel would need only a part-time aide in the future. The district court, however, conducted a full evidentiary hearing and made a thorough analysis. The court found the Hollands' evidence to be more persuasive. Moreover, the court asked Rachel's teacher extensive questions regarding Rachel's need for a part-time aide. We will not disturb the findings of the district court.

The District is also not persuasive on the issue of cost. The District now claims that it will lose up to $ 190,764 in state special education funding if Rachel is not enrolled in a special education class at least 51% of the day. However, the District has not sought a waiver pursuant to California Education Code § 56101. This section provides that (1) any school district may request a waiver of any provision of the Education Code if the waiver is necessary or beneficial to the student's IEP, and (2) the Board may grant the waiver when failure to do so would hinder compliance with federal mandates for a free appropriate education for children with disabilities. Cal. Ed. Code § 56101(a) & (b). (Deering 1992).

Finally, the District, citing Wilson v. Marana Unified Sch. Dist., 735 F.2d 1178 (9th Cir. 1984), argues that Rachel must receive her academic and functional curriculum in special education from a specially credentialed teacher. Wilson does

not stand for this proposition. Rather, the court in Wilson stated:

> The school district argues that under state law a child who qualifies for special education must be taught by a teacher who is certificated in that child's particular area of disability. We do not agree and do not reach a decision on that broad assertion. We hold only, under our standard of review, that the school district's decision was a reasonable one under the circumstances of this case.

735 F.2d at 1180 (emphasis in original). More importantly, the District's proposition that Rachel must be taught by a special education teacher runs directly counter to the congressional preference that children with disabilities be educated in regular classes with children who are not disabled. See 20 U.S.C. § 1412(5)(B).

We affirm the judgment of the district court. While we cannot determine what the appropriate placement is for Rachel at the present time, we hold that the determination of the present and future appropriate placement for Rachel should be based on the principles set forth in this opinion and the opinion of the district court.

AFFIRMED.

APPENDIX G — OPINION OF THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF CALIFORNIA FILED MARCH 2, 1994

In the matter of BOARD OF EDUCATION, SACRAMENTO CITY UNIFIED SCHOOL DISTRICT Plaintiff, v. RACHEL HOLLAND, by and through her guardian ad litem, ROBERT HOLLAND; WILLIAM HONIG, CALIFORNIA STATE SUPERINTENDENT OF PUBLIC INSTRUCTION; CALIFORNIA STATE DEPARTMENT OF EDUCATION HEARING OFFICE, McGEORGE SCHOOL OF LAW; and MARY COTE, HEARING OFFICER, Defendants.

Civ. S-90-1171-DFL

UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF CALIFORNIA

786 F. Supp. 874

March 2, 1992, Decided
March 2, 1992, Filed

OPINION: ORDER

Defendant Rachel Holland is a nine year old girl who is moderately mentally retarded. She has an I.Q. of 44 and on academic testing functions at about the level of a four year old child. She is well behaved and popular with her second grade classmates. She enjoys school and is motivated to learn. Plaintiff Sacramento Unified School District (the "District") proposes to educate Rachel half-time in a special education class with other handicapped children, and half-time in a regular classroom. Believing that Rachel would benefit from a full-time placement in a regular classroom, Rachel's parents appealed the District's placement decision to a California Special Education hearing officer. Following fourteen days of hearings, the hearing officer ruled in favor of the parents and ordered that the District place Rachel in a regular classroom with certain support services. The District now appeals from that decision. Both the parents and the California State Department of Education seek affirmance of the ruling below.

The court must determine whether the decision by the hearing officer complies with the Individuals with Disabilities Education Act (the "IDEA" or the "Act"), 20 U.S.C. §§ 1400-1485. The IDEA requires that a state which accepts federal funds must provide a "free appropriate" education to all children. 20 U.S.C. § 1412. The IDEA also requires that to the "maximum extent appropriate," handicapped children must be educated with non-handicapped children. The central question here is whether, for Rachel, a full time placement in a regular education class is the "appropriate" placement. For the reasons stated below, the court concludes that it is.

Appendix G

I

Rachel attended a variety of special education programs provided by the District from 1985 until 1989.[7] While Rachel was in special education classes provided by the District, she spent a small part of each day with nonhandicapped children. For the period from 1987 through 1989, Rachel received no more than approximately one hour per day of integration with a regular class. Her parents repeatedly sought, with little success, to increase the amount of time Rachel spent in regular classrooms. In the fall of 1989, the Hollands requested that Rachel be placed full-time in a regular classroom for the 1989-90 school year. The District rejected this request and offered only special education placements for Rachel. Later, after mediation, the District proposed a placement for Rachel that included some integration into a regular classroom. The proposed placement would have divided Rachel's time between a regular class for nonacademic activities--such as art, music, lunch, and recess--and a special education class of handicapped children for all academic subjects. This would have required moving Rachel at least six times each day between the two classes. The Hollands rejected the District's proposals and entered Rachel in a regular kindergarten class at the Shalom School, a private school. Rachel has remained at the Shalom School in regular classes and is now in second grade. She is assisted by a part-time aide who sits by her in the classroom.

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[7] A complete history of Rachel's educational history and the Hollands' negotiations with the District is contained in the hearing officer's order at 2-5.

Although unable to agree on a placement for Rachel, the District and the Hollands, through mediation, agreed on an Individualized Education Program for Rachel. The IDEA requires such a program, known as an IEP, for each handicapped child and requires that it be reviewed at least annually. See 20 U.S.C. § 1401(19).[8] Because of the dispute between the District and the Hollands, Rachel's IEP has not been revised since January 1990. Rachel's 1990 IEP stresses language and communication goals. The agreed objectives include: speaking in four or five word sentences; repeating instructions of complex tasks; initiating and terminating conversations; verbally stating her name, address, and telephone number; participating in a personal safety program with classmates; developing a 24-word sight vocabulary; counting to 25; printing her first and last name and the alphabet; playing cooperatively; participating in lunch without teacher supervision; identifying upper and lower case letters and sounds associated with them; and following her schedule of daily activities.

The Hollands appealed the District's placement decision to a state hearing officer, as provided by the IDEA. See 20 U.S.C.

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[8] The IEP "is prepared at a meeting between a qualified representative of the local educational agency, the child's teacher, the child's parents or guardian, and where appropriate, the child. . . ." Board of Educ. v. Rowley, 458 U.S. 176, 182, 102 S. Ct. 3034, 73 L. Ed. 2d 690 (1982). The IEP contains a statement of (a) the child's present educational abilities; (b) annual and short-term achievement goals; (c) the educational services to be provided and the extent to which the child will participate in regular educational programs; (d) the projected date and duration of the services to be provided; and (e) a means for evaluating whether the objectives are being met. 20 U.S.C. § 1401(19).

§ 1415(b)(2). The District's position at the hearing, as here, was that Rachel is too severely handicapped to benefit from a full time placement in a regular class. The Hollands offered testimony to support their view that Rachel best learns both social and academic skills in a regular education classroom, and that she would not benefit from being placed in a special education class.

Following a two week hearing, in a lengthy opinion dated August 15, 1990, the hearing officer found that the District had failed to make an adequate effort to educate Rachel in a regular class as required by the IDEA. The hearing officer found that Rachel had benefited from her year of kindergarten in a regular class at the Shalom School. In reaching this conclusion, the hearing officer found the testimony of Rachel's teacher was entitled to more weight than District witnesses, who testified that Rachel's experience at Shalom was not successful. Further, the hearing officer found that Rachel was motivated to learn and that she learned by imitation and modeling such that she would benefit from a regular classroom setting. The hearing officer found no evidence that Rachel would be disruptive in a regular education classroom and further concluded that Rachel's IEP goals were consistent with the first grade curriculum. Finally, the hearing officer found that the District had overstated the cost of placing Rachel in a regular classroom with supplemental aids, and that the cost of such a placement would not be so great that it weighed against placing Rachel in a regular classroom. The hearing officer ordered the District to place Rachel in a regular education classroom

with appropriate support services, including a part-time special education consultant and a part-time classroom aide. Under the order, the parties were to agree on the aide and consultant time required, returning to the hearing officer if they were unable to reach an agreement.

The District appealed this determination to the district court. See 20 U.S.C. § 1415(e). In accordance with 20 U.S.C. 1415(e)(2),[9] the parties presented additional evidence during an evidentiary hearing held on December 16, 17, and 18, 1991. Since the decision of the hearing officer in 1990, Rachel has completed first grade and half of second grade at the Shalom School in regular classrooms.[10] The main purpose of the hearing was to provide evidence of Rachel's progress or lack of progress during this time period. Having considered the evidence presented at the evidentiary hearing, as well as the evidence presented before the hearing officer, the court now

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[9] Section 1415(e)(2) provides that a court reviewing an administrative determination of the placement of a handicapped child may hear additional evidence at the request of a party.

[10] Although the hearing officer reviewed the appropriateness of Rachel's first grade placement, a year which is now past, the case is not moot. The dispute between the parties is a continuing one, and the same issues will recur throughout her academic life. The nine month school year does not provide enough time for the judicial review provided by the Act. "Administrative and judicial review of an IEP is 'ponderous' and usually will not be complete until a year after the IEP has expired." Daniel R.R. v. State Bd. of Educ., 874 F.2d 1036, 1041 (5th Cir. 1989). Where, as here, the dispute over the IEP is "capable of repetition . . . yet evading review," it is not mooted by the passage of time. Rowley, 458 U.S. at 186 n.9 (citing Murphy v. Hunt, 455 U.S. 478, 482, 102 S. Ct. 1181, 71 L. Ed. 2d 353 (1982)); see Weinstein v. Bradford, 423 U.S. 147, 149, 46 L. Ed. 2d 350, 96 S. Ct. 347 (1975).

affirms the decision of the hearing officer that Rachel Holland should be placed full-time in a regular classroom. [11]

II.

The Individuals with Disabilities Education Act, which governs this lawsuit, provides federal funds to states for the education of handicapped children. Board of Educ. v. Rowley, 458 U.S. 176, 179, 102 S. Ct. 3034, 73 L. Ed. 2d 690 (1982). If a state elects to receive these funds, the Act requires that the state adopt certain procedures and practices in the education of the handicapped. The IDEA requires that each handicapped child be provided a free appropriate education, and be educated "to the maximum extent appropriate" with children who are not handicapped. 20 U.S.C. §§ 1412(1) and (5); see 20 U.S.C. § 1401(a)(1) (broadly defining "handicapped"). The free appropriate education requirement is satisfied if "personalized instruction is being provided with sufficient support services to permit the child to benefit from the instruction, and other items of the definitional checklist are satisfied." Rowley, 458 U.S. at 189.

The second requirement, that each child be educated with nonhandicapped children to the maximum extent appropriate,

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[11] A district court reviewing an administrative determination under the IDEA conducts a de novo review, but gives due weight to the hearing officer's views. Gillette v. Fairland Bd. of Educ., 932 F.2d 551, 553 (6th Cir. 1991); Norton School Comm. v. Massachusetts Dep't of Educ., 768 F. Supp. 900, 903-04 (D. Mass. 1991). "The fact that [the IDEA] requires that the reviewing court 'receive the records of the [state] administrative proceedings' carries with it the implied requirement that due weight shall be given to these proceedings." Rowley, 458 U.S. at 204 (quoting 20 U.S.C. § 1415(e)).

is the basis of the dispute in this case. The Act requires each state receiving federal funds to establish

> procedures to assure that, to the maximum extent appropriate, handicapped children . . . are educated with children who are not handicapped and that special classes, separate schooling, or other removal of handicapped children from the regular educational environment occurs only when the nature or severity of the handicap is such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily.

20 U.S.C.§l 1412(5)(B). The placement of handicapped children in regular classrooms "to the maximum extent appropriate" is sometimes referred to as "mainstreaming" or as placement in the "least restrictive environment." See 34 C.F.R. § 300.550.[12] The Act "has a strong preference for

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[12] At the evidentiary hearing held by this court, there was some disagreement as to what the terms "mainstreaming" and "full-inclusion" mean in the context of educating developmentally delayed or physically handicapped children. Mainstreaming means educating a handicapped child with non-handicapped peers. Briggs v. Board of Educ., 882 F.2d 688, 691 (2d Cir. 1989). As to full inclusion, the court accepts the definition offered by Dr. Wayne Sailor: that the handicapped child is a full member of a regular education class. Dr. Sailor testified that under full-inclusion, the child need not be in the classroom 100% of the time. He noted that the child may be removed from that class to receive supplementary services such as physical or speech therapy when these services cannot be provided in the classroom. Under full-inclusion, the child's primary placement is in the regular education class, and the child has no additional assignment to any

mainstreaming" which rises to the level of a rebuttable presumption. Daniel R.R. v. State Bd. of Educ., 874 F.2d 1036, 1044-45 (5th Cir. 1989). The Act also views each handicapped child as having unique needs entitled to individualized consideration. See 20 U.S.C. §§ 1400(c), 1401(a)(16) & (19). Thus, the decision as to whether any particular child should be educated in a regular classroom setting, all of the time, part of the time, or none of the time, is necessarily an inquiry into the needs and abilities of one child, and does not extend to a group or category of handicapped children, as the District suggests. See Daniel R.R., 874 F.2d at 1048 ("our analysis is an individualized, fact-specific inquiry").

III.

In considering whether the District has proposed a placement for Rachel that complies with the Act, the court must determine what is meant by the requirement that handicapped children be mainstreamed "to the maximum extent appropriate." Because the Act does not define this requirement, cases interpreting the Act guide the court's analysis. The federal appellate courts have recognized the following factors as relevant to determining if a placement is appropriate: (1) the educational benefits available to the child in a regular classroom, supplemented with appropriate aids and services, as compared to the educational benefits of a special education

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special class for handicapped children. See Pltf's Ex. 7, Lou Brown, How Much Time Should Students with Severe Intellectual Disabilities Spend in Regular Education Classrooms and Elsewhere, TASH, 1991 Vol. 16, No. 1 at 40 ("based in" refers to "being a member of a real class").

classroom; (2) the non-academic benefits to the handicapped child of interaction with nonhandicapped children; (3) the effect of the presence of the handicapped child on the teacher and other children in the regular classroom; and (4) the costs of supplementary aids and services necessary to mainstream the handicapped child in a regular classroom setting. Greer v. Rome City Sch. Dist., 950 F.2d 688, 697 (11th Cir. 1991); Barnett v. Fairfax County Sch. Bd., 927 F.2d 146, 153-54 (4th Cir.), cert. denied, 112 S. Ct. 175, 116 L. Ed. 2d 138 (1991); Daniel R.R., 874 F.2d at 1048-50; Roncker v. Walter, 700 F.2d 1058 (6th Cir.), cert. denied, 464 U.S. 864, 104 S. Ct. 196, 78 L. Ed. 2d 171 (1983).

As to the first factor, if the child's disabilities are so severe that he or she will receive little or no academic benefit from placement in a regular education class, then mainstreaming may not be appropriate. DeVries v. Fairfax County Sch. Bd., 882 F.2d 876, 879 (4th Cir. 1989) (disparity between cognitive levels of handicapped 17-year old and non-handicapped peers so great that 17-year old would be simply "monitoring" regular classes). However, the Act's requirement of integration, based on recognition of the non-academic value of such integration, is not overcome by a showing that a special education placement may be academically superior to placement in a regular classroom. Roland v. Concord School Comm., 910 F.2d 983, 993 (1st Cir. 1990), cert. denied, 113 L. Ed. 2d 230, 111 S. Ct. 1122 (1991) (citing Roncker, 700 F.2d at 1063); Norton Sch. Comm. v. Massachusetts Dept. of Educ., 768 F. Supp. 900, 910 (D. Mass. 1991). The Act's presumption

in favor of mainstreaming requires that a handicapped child be educated in a regular classroom if the child can receive a satisfactory education there, even if it is not the best academic setting for that child. Further, in considering the relative educational benefits available in integrated and non-integrated settings, the school district must demonstrate that it has considered "whether supplemental aids and services would permit satisfactory education in the regular classroom." Greer, 950 F.2d at 696. Only if the child cannot receive a satisfactory education in a regular education class, even if appropriate support services are offered, should the child be placed in a special education class. See Roncker, 700 F.2d at 1063.

The second factor addresses the significant non-academic benefits a handicapped child may receive from exposure to nonhandicapped peers. This factor reflects the fundamental purpose of the IDEA's mainstreaming requirement. A handicapped child may benefit from language and behavior models provided by nonhandicapped children. See Daniel R.R., 874 F.2d at 1049 ("The language and behavior models available from nonhandicapped children may be essential or helpful to the handicapped child's development. In other words, although a handicapped child may not be able to absorb all of the regular education curriculum, he may benefit from nonacademic experiences in the regular education environment."); accord, Greer, 950 F.2d at 697; Liscio v. Woodland Hills Sch. Dist., 734 F. Supp. 689, 702 (W.D. Pa.), aff'd w/o op., 902 F.2d 1561 (3d Cir. 1990) (partial integration appropriate where child "benefits from his interaction with

non-handicapped peers . . . and enjoys such interaction"). Moreover, the nonacademic benefits of mainstreaming a child are closely related to the academic benefits. See Greer, 950 F.2d at 697. For example, a child may be better able to learn academic subjects because of improved self-esteem and increased motivation due to placement in regular education.

The third factor addresses the possible negative effects of placing a handicapped child in a regular classroom. The child may be disruptive to other children or may unreasonably occupy the teacher's time to the detriment of other students. Daniel R.R., 874 F.2d at 1049. If other children are disadvantaged by the presence of the handicapped child, mainstreaming is not appropriate. Id. When evaluating the burden that would be created by placing a handicapped child in a regular education class, the school district must consider all reasonable means to minimize the demands on the teacher:

> A handicapped child who merely requires more teacher attention than most other children is not likely to be so disruptive as to significantly impair the education of other children. In weighing this factor, the school district must keep in mind its obligation to consider supplemental aids and services that could accommodate a handicapped child's need for additional attention.

Greer, 950 F.2d at 688. A teacher's aide can minimize the burden on the teacher if the handicapped child is not disruptive but needs special assistance. This factor weighs against placing a handicapped child in regular education only if, after taking all reasonable steps to reduce the burden to the teacher, the other children in the class will still be deprived of their share of the teacher's attention.

Finally, a school district may properly consider cost as a factor in making placement decisions.

> The school district must balance the needs of each handicapped child against the needs of other children in the district. If the cost of educating a handicapped child in a regular classroom is so great that it would significantly impact upon the education of other children in the district, then education in a regular classroom is not appropriate.

Greer, 950 F.2d at 697; see Barnett, 927 F.2d at 154; Roncker, 700 F.2d at 1063 (cost a factor because excessive spending on one handicapped child may deprive other handicapped children). Only where the cost of placing a handicapped child in regular education will significantly affect other children in the district will this factor weigh against placement in a regular classroom.

In addition to the four factors discussed above, the District urges the court to consider the extent of curriculum modification as a distinct factor. But modification of the

curriculum for a handicapped child, even dramatic modification, has no significance in and of itself. The IDEA, in its provision for the IEP process, contemplates that the academic curriculum may be modified to accommodate the individual needs of handicapped children. Curriculum modification becomes significant only if it bears upon the factors already noted. For example, modification of the curriculum may place undue burdens on the teacher both because to modify the curriculum is time consuming and to teach, in effect, two classes in one room could prove impossible. Also, a drastically modified curriculum could deprive the handicapped child of that sense of belonging to a regular class that is important to the achievement of nonacademic benefit.

IV.

The District has the burden of demonstrating that its proposed placement of Rachel in a regular classroom for slightly less than half of the day provides mainstreaming to "the maximum extent appropriate" for Rachel.[13] As

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[13] The statutory presumption in favor of mainstreaming has been construed as imposing a burden on the school district to prove that a child cannot be mainstreamed. Davis v. District of Columbia Bd. of Educ., 530 F. Supp. 1209, 1211 (D.D.C. 1982) (school district has burden of proving that placement is appropriate).
This burden is explicit in 45 C.F.R. 184.34, a regulation which implements the Rehabilitation Act of 1973, designed to prevent discrimination against people with handicaps in any program receiving federal funding. "A recipient [of federal funds] shall place a handicapped person in the regular educational environment . . . unless it is demonstrated by the recipient that the education of the person in the regular environment with the use of supplementary aids and services cannot be achieved satisfactorily." Although this regulation is not promulgated under the IDEA,

discussed below, three of the four factors favor mainstreaming, and on the fourth, cost, the District has not met its burden.

A. Educational Benefits to Rachel.

The first factor, the comparative educational benefits to placement in regular or special education classes, weighs in favor of placing Rachel in a regular classroom. The Holland witnesses credibly testified that all of Rachel's goals and objectives could be achieved either in the regular class with some curriculum modification, or through supplementary aids and services. Most of Rachel's IEP goals relate to communication, which the Holland witnesses testified could best be taught by exposure to other children. The District's proffered testimony was focused primarily on Rachel's educational limitations, but did not establish that the educational opportunities available through special education were superior or equal to those available in a regular education setting.

The bulk of the evidence presented by the District related to Rachel's performance on achievement and aptitude testing conducted by the California Diagnostic Center, and observation of Rachel at school by members of the Diagnostic Center team that tested Rachel. According to the Diagnostic Center witnesses, Rachel has made no progress toward her 1990 IEP goals and derives little academic benefit from regular class placement. These witnesses further suggest that

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it reflects the same strong preference for mainstreaming. Moreover, the District also bears the burden of proof because it seeks to overturn the decision of the hearing officer.

supplemental aids and services are ineffective. By contrast, the Hollands' witnesses testified that Rachel had made significant academic strides at the Shalom School. They suggest that her motivation to learn stems from the regular classroom placement and that she is learning language and other skills from modeling the behavior of her non-handicapped peers. The California Department of Education agrees with the Hollands that Rachel benefits academically from placement in a regular education class.

It is evident that the contrary assessments of Rachel's academic progress are founded in conflicting educational philosophies. The Diagnostic Center witnesses do not believe that a child with Rachel's I.Q. can be effectively educated in a regular classroom.[14] They believe that Rachel's education at this point should focus on functional skills, such as handling money, doing laundry, and using public transportation. Conversely, the Holland experts believe that all handicapped children, even children with much greater handicaps than Rachel, are best educated in regular classrooms. They believe that it is a mistake to limit Rachel's learning opportunities to functional skills.

These sharply different points of view have led the experts to different evaluations of the progress Rachel has made since

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[14] "The perception that a segregated institution is academically superior for a handicapped child may reflect no more than a basic disagreement with the mainstreaming concept. Such a disagreement is not, of course, any basis for not following the Act's mandate." Roncker, 700 F.2d at 1063 (citing Campbell v. Talladega City Bd. of Educ., 518 F. Supp 47, 55 (N.D. Ala. 1981)).

placement in a regular class at the Shalom School in 1989. One example illustrates how differing educational philosophies may color perceptions. During the November 1991 assessment, one of the Diagnostic Center witnesses observed Rachel in Hebrew class. She was holding the book upside down. The witness drew the conclusion that Rachel was deriving no benefit from inclusion in the class. One of the Holland witnesses observed the same incident. This witness saw that another child helped Rachel right the book and find her place. From this incident, the witness concluded that Rachel had positive interaction with her peers that would be important to her future ability to live in society.

The court suggests no criticism of these witnesses. But because of the radically different points of view from which they start, their observations on Rachel's academic progress are by no means objective. Nonetheless, the court finds more credible the Holland witnesses' testimony concerning Rachel's academic progress. First, these witnesses have more background in evaluating handicapped children placed in regular classrooms, and they had greater opportunity to observe Rachel over an extended period of time in normal circumstances. Moreover, it appears that for much of the formalized testing by the Diagnostic Center, Rachel was uncomfortable and unhappy. Finally, to the extent that the Holland witnesses have a preference for mainstreaming, it is a preference shared by Congress and embodied in the IDEA.

Because of the conflict among the experts as to Rachel's academic progress, the testimony of her current teacher is all

the more important. The District concedes that Nina Crone, Rachel's second grade teacher, is an experienced, skillful teacher. She has no partisan involvement in this controversy. Crone testified that Rachel is a full member of the second grade class. She participates in all activities. For the class as a whole, Crone's major areas of emphasis are socialization, behavior and communication. These are the same areas of emphasis in Rachel's IEP. Crone testified that Rachel was making progress on her IEP goals. For example, Crone noted that Rachel is learning one-to-one correspondence in counting. She can recite the English and Hebrew alphabets, and her communication abilities and sentence length are also improving. Crone testified that Rachel is in many ways a typical second grader. She is eager to participate in class activities and is very motivated. She has become more self-confident and independent. Crone's testimony is consistent with the testimony of Rachel's kindergarten teacher at the Shalom School. See hearing officer's op. at 5-6.

The District offered no persuasive evidence that Rachel would receive educational benefits in special education classes that are equal to or greater than those available in special education classes. Although the District's witnesses testified that many of Rachel's IEP goals could best be implemented in a special education setting, there is no empirical evidence to support this assertion. Rachel made very little progress while in special education in kindergarten. Her special education teacher testified that Rachel had an extremely slow rate of learning, poor social skills, and interacted better with adults

than children. When Rachel was shuttled into a regular education class for an informal mainstreaming program, she was treated as an outsider by the non-handicapped children and derived little benefit from her short exposure to these children. The program currently proposed by the District mirrors in part the deficiencies of the previous program. The proposed program would move Rachel out of the regular class whenever academic subjects were being taught. Rachel would be moved in and out of class at least six times per day. Such a program would mark Rachel as an outsider, depriving her of the primary benefit of mainstreaming.

In short, the District has failed to meet its burden of establishing that Rachel would not receive academic benefits in regular classes and has failed to demonstrate that placement in special classes will provide equal or greater educational benefit to Rachel. Based on the record below and the supplemental evidence presented at the hearing, the court finds that Rachel receives substantial academic benefits in regular education. The court finds that all of Rachel's IEP goals could be implemented in a regular education setting with some modification to the curriculum and with the assistance of a part-time aide.[15]

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[15] In defending its proposed placement, the District argues that the California Department of Education and the Holland experts ignore the IDEA's requirement that school districts provide an appropriate continuum of educational placements. The District misunderstands the requirements of the IDEA. The IDEA requires mainstreaming to the maximum extent appropriate. Because the extent of mainstreaming that is appropriate will vary from child to child, a continuum of placements is necessary to comply with the IDEA's mandate. However, mainstreaming is the starting point and presumption. A placement in other than a regular class is a fall-back choice

B. Non-academic Benefits to Rachel.

As discussed above, a handicapped child may derive significant non-academic benefits from education with nonhandicapped peers. The District's evidence tended to show that Rachel is not learning from exposure to other children and that she is isolated from her classmates. The Hollands' evidence supported the conclusion that Rachel has developed her social and communication skills as well as her self-confidence from her placement in regular education. As before, these differing evaluations in large part reflect the predisposition of the evaluators. The court finds the testimony by Rachel's current teacher and Rachel's mother the most credible as to the nonacademic benefits Rachel derives from her placement in a regular classroom. Perhaps the strongest evidence that Rachel is gaining incidental benefits from being mainstreamed is her excitement about school and her improved self-confidence. The two witnesses who testified to Rachel's positive attitude, her mother and her teacher, are in a far better position to know and understand Rachel's emotional well-being and social development than the District's witnesses, who evaluated Rachel primarily by using standardized testing techniques. Although Rachel's mother cannot be considered an objective observer, she has had the opportunity to compare Rachel's attitude toward school when she was in special education and since she has been in regular education. She testified that since Rachel was placed in

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made only after it is determined that placement in regular classes will be unsuccessful.

a regular class, she has been excited and enthusiastic about learning. Rachel relishes the new friendships that she has developed at the Shalom School. Because of the evidence that Rachel is developing socially from her full-time placement in a regular education class, this factor weighs in favor of placing Rachel in a regular class.[16]

C. Effect on the Teacher and Other Children.

The third factor-- effect on others in the class-- has two aspects. The first is whether there is detriment to the other students because the handicapped child is disruptive, distracting, or unruly. There has been no evidence presented to this court that Rachel is a discipline problem at school or distracts other children. The witnesses, including the District's, were in agreement that Rachel is an agreeable child who follows directions and is well-behaved. When Rachel works separately with her aide, it is not a distraction for the other children. The second consideration is whether the handicapped child would take up so much of the teacher's time that the other students would suffer from lack of attention. The most germane evidence on this point comes from Rachel's second grade teacher, who testified that she does not find that Rachel's presence interferes with her ability to teach the

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[16]Rachel is currently in second grade. The District asserts that Rachel should be placed in fourth grade next year so she can model age appropriate behavior. However, Dr. Sailor testified that although Rachel should be educated with children near her age, it is not necessary that there be an exact match. Rachel is no more than two years older than the children with whom she is now placed. This age difference is not so pronounced that she is learning inappropriate behavior, or is not perceived as part of the class.

other children. Rachel's teacher testified that she was initially apprehensive about her ability to teach Rachel and the rest of the class. Now that she has had experience with Rachel, she finds that Rachel's assignment to her class is not burdensome.

Because there is no evidence of detriment to other children in Rachel's regular education classroom, this factor also weighs in favor of placing Rachel in a regular education program.

D. Cost

The question of how much it would cost to place Rachel in a regular education class with the necessary support services was vigorously contested by the District on one hand and by the California Department of Education and the Hollands on the other. According to the District witnesses, the placement that the Hollands are requesting for Rachel would cost $109,000 per year. This cost estimate is based on a full-time aide for Rachel, and also attributes to Rachel alone the cost of school-wide training programs that would benefit other students.

The District has painted an exaggerated, hyperbolic picture of what it would cost to educate Rachel in a regular classroom with appropriate support services. For example, the District claims that it would cost over $80,000 to provide school-wide sensitivity training. Yet the District does not establish that such training is necessary. And even if it is, the California Department of Education provided evidence that such training may be had for free. Nor is it appropriate to assign the total cost to Rachel when other handicapped children will benefit.

Similarly, the evidence does not suggest that Rachel requires a full-time aide.[17]

In reality the cost comparison is between placing Rachel in a special class with a full-time special education teacher and two full-time aides, with approximately 11 other children, with placing her in a regular class with a part-time aide. The District has provided no evidence of this cost comparison, presumably because the difference is modest. To the extent that the special class has fewer than 12 children, and that the cost of a special education teacher exceeds that of an aide, the difference in cost will be reduced. Moreover, the California Department of Education provides free in-service training programs to assist schools that wish to fully integrate handicapped students.

The District also argues that it will lose significant funding from the state if Rachel does not spend at least 51% of her time in special education classes. Ordinarily, state funding is allocated according to a formula that is based in part on how

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[17]The District asserts that the Hearing Officer's proposed placement in a regular second grade class with a part-time aide violates California law requiring that handicapped children receive instruction on their IEP goals from specially credentialed teachers. This argument misconceives California's credentialing requirements. Although Rachel's educational program must be supervised by an appropriately credentialed professional, there is no requirement that she learn academic subjects only from a special education credentialed teacher. Furthermore, even if California did require that handicapped children be taught only by specially credentialed teachers, it would conflict with the IDEA's mainstreaming requirement favoring education by regular teachers. Where federal law conflicts with state law, federal law prevails.
Furthermore, Cal. Educ. Code § 56101 provides that a school district can request a waiver of any provision of the Education Code necessary to implement a student's IEP. The District could apply for a waiver of the credentialing requirement, if there were one, in order to educate Rachel in a regular class.

much time a child spends in a special education class. If Rachel were moved out of special education class, the District claims it would lose funding equivalent to one teacher and three aides. However, the California Department of Education witness testified that waivers are available from the state if a school district seeks to adopt a program that does not fit neatly with funding guidelines. If a school district receives a waiver, it will not lose any funding because it places handicapped students in regular classes. The District has not applied for such a waiver. According to the California Department of Education's evidence, the District will incur little additional cost by providing full-time placement in regular education classes among the continuum of options offered to handicapped children.

Furthermore, the IDEA provides funding for the specific purpose of educating handicapped children, and envisions that those monies will be used in part to provide the supplemental aids and services that make mainstreaming possible. The funding provisions suggest that the IDEA foresees some possible increased costs due to mainstreaming. Those increased costs are permissible so long as they are not of a magnitude that will affect other programs or other handicapped children.

In short, the court concludes that the cost of placing Rachel full-time in a regular class, as opposed to placing her in a special class for handicapped children, is modest if there is any additional cost at all. By inflating the costs, and failing to address the true comparison, the District does not meet its burden of proving that regular placement would burden

the District funds or adversely affect services available to other children. Because the District has offered no persuasive or credible evidence in support of its claim that educating Rachel in a regular education classroom with appropriate services would be significantly more expensive than educating her in the District's proposed setting, this factor does not weigh against mainstreaming Rachel.

V

For the reasons discussed, the court finds that the appropriate placement for Rachel Holland, under the Individuals with Disabilities Education Act, is in a regular second grade classroom, with some supplemental services, as a full-time member of that class.

Children change, the educational demands on them change, and Rachel may change.[18] If Rachel does not flourish under this placement in the future, then adjustments should be made. The IDEA foresees such adjustments at the annual IEP review. But the weight of the evidence suggest that this is the appropriate placement now for Rachel Holland.

The decision of the hearing officer is affirmed.

IT IS SO ORDERED.

Dated: 2 March 1992.

DAVID F. LEVI, Judge

United States District Court

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[18]See Brown, supra note 6, at 46 ("How much time should be spent in regular classes Enough to ensure that the student is a member, not a visitor. A lot, if the student is engaged in meaningful activities. Quite a lot if she is young, but less as she approaches 21. There is still a lot we do not know.")

APPENDIX H — SUPPLEMENTAL ORDER OF THE CALIFORNIA SPECIAL EDUCATION HEARING OFFICE DATED SEPTEMBER 6, 1990

BEFORE THE
CALIFORNIA SPECIAL EDUCATION HEARING OFFICE

In the matter of:

RACHEL HOLLAND,

Petitioner,

vs.

SACRAMENTO CITY UNIFIED DISTRICT,

Respondent and Cross-Petitioner

SUPPLEMENTAL ORDER

Between April and July of 1990, a 14-day hearing was held in the above-named case. On August 14, 1990, Hearing Officer Mary L. Cote issued a decision, which in part, ordered the Sacramento City Unified School District to place Rachel Holland "in a regular first grade class, preferably in the Interdisciplinary Curriculum/Arts Magnet Program, for the 1990-91 school year, with appropriate support services

including a part-time special education consultant and a part-time classroom aide."

Because of the difficulty of ascertaining the exact amount of support time required to facilitate Rachel's placement in a regular first grade class, the Hearing Officer retained jurisdiction over the case, pending agreement by the parties on the level of support services required to facilitate Rachel's placement in a first grade class. The decision states in pertinent part, "The parties shall meet to determine the number of hours each week that Rachel will require support from the special education consultant and classroom aide. Should they fail to reach agreement one week prior to the commencement of the 1990-91 school year, the parties shall submit their specific proposals which set forth the number of hours required from these support personnel to the Hearing Officer by August 31, 1990."

Following several meetings and a number of letters between the parties and to the Hearing Officer, the parties were unable to reach agreement on the level of support to be provided to Rachel. Diane Lipton, Attorney for Rachel Holland, additionally asserted that the parties had not reached agreement regarding class placement, a specific special education consultant, and the participants in a meeting proposed for two weeks following Rachel's placement in a District class. Victor J. James, II, Attorney for the District, asserted that the only issue over which the Hearing Officer retained jurisdiction was the determination of the number of hours for the special education consultant and classroom aide

to assist Rachel in her first grade placement. Both parties requested a telephone conference to resolve the dispute.

On September 6, 1990, a conference call was held between Mary L. Cote, Hearing Officer, Katherine Dobel and Diane Lipton, Attorneys for Rachel Holland, and Victor J. James, II and Sharon Seay, Attorneys for the District. Although Ms. Lipton raised a number of issues in addition that over which the Hearing Officer retained jurisdiction in the decision of August 14, 1990, she did not support her request to the Hearing Officer to address these additional issues with statutory or case law, nor has she stated a claim under the EHA. Moreover, these issues were not within the jurisdiction retained by the Hearing Officer in this case, as correctly asserted by Mr. James. The Hearing Officer, therefore, declines to rule on issues other than that over which she retained jurisdiction, namely the number of hours a special education consultant and classroom aide are required to support Rachel's placement in a regular first grade classroom.

The parties agreed that the special education consultant shall provide a total of 36 hours for the first two weeks Rachel attends school in the District. The Hearing Officer concludes that two hours of that time are to be allocated to a meeting with Rachel's parents and the regular first grade teacher, if requested by Rachel's parents.

Regarding the classroom aide, the District proposed 32.5 hours for the first two weeks Rachel attends school in the District, while Ms. Lipton, on behalf of Rachel, proposed 39.5 hours. Rachel's school day is 6.5 hours. Ms. Lipton asserted

that either the aide or the consultant should be present in the classroom with Rachel during the first two weeks she attends school in the District and that their presence in the class should overlap to enable the consultant to provide training to the aide. On behalf of the District, Ms. Seay asserted that the level of support requested by Ms. Lipton was contrary to the testimony of experts at the hearing, who believed that Rachel functions in the classroom in the absence of support staff should also be taken into consideration when evaluating the level of continuing support required by Rachel. The Hearing Officer is persuaded that 32.5 hours is a reasonable amount of time for the classroom aide to be available for the first two weeks Rachel attends school in the District.

The parties agreed that the Hearing Officer shall continue to retain jurisdiction over the case until resolution of the continuing level of support services required by Rachel, which shall be determined at the end of the first two-week period that Rachel attends school in the District.[1]

SUPPLEMENTAL ORDER

(1) The special education consultant shall provide a total of 36 hours of consultation to Rachel's first grade teacher and aide for the first two weeks Rachel attends school in the District. This time shall include a meeting between Rachel's parents, the

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[1] The parties originally agreed to meet on September 18, 1990, two weeks after the first day of the 1990-91 school year. Since Rachel has yet to attend school in the District, it is appropriate to schedule a meeting at the end of the first two weeks she actually attends school in the District.

consultant, and Rachel's first grade teacher, if requested by Rachel's parents.

(2) The classroom aide shall provide a 32.5 hours of support to Rachel during the first two weeks Rachel attends school in the District.

(3) Rachel's parents, first grade teacher, special education consultant, classroom aide, and other appropriate personnel shall meet at the end of the first two-week period that Rachel attends school in the District, to determine the continuing amount of support services Rachel requires from the special education.

(4) The Hearing Officer shall retain jurisdiction over the case until resolution of the level of continuing support services required by Rachel, which shall be determined at the end of the first two-week period that Rachel attends school in the District.

DATED: September 6, 1990

Mary L. Cote, Hearing Officer
California Special Education Hearing Office

APPENDIX I — DECISION OF THE CALIFORNIA SPECIAL EDUCATION HEARING OFFICE DATED AUGUST 14, 1990

BEFORE THE
CALIFORNIA SPECIAL EDUCATION HEARING OFFICE

In the matter of:

RACHEL HOLLAND,

Petitioner,

vs.

SACRAMENTO CITY UNIFIED DISTRICT,

Respondent and Cross-Petitioner

DECISION

This matter was heard on April 18, 19, 24, 25, and 26, May 10, June 4, 5, 7, and 8, and July 9, 10, 11, and 12, 1990, in Sacramento, California, by Mary L. Cote, Hearing Officer of the California Special Education Hearing Office, McGeorge School of Law.

Rachel Holland was represented by Kathryn E. Dobel and Diane Lipton, Attorneys at Law. Also present on behalf of

Rachel were her parents, Kim Connor and Robert Holland. Sacramento City Unified School District was represented by Sharon H. Seay and Victor J. James, II, Attorneys at Law. Also present on behalf of the District was Susan Lytle Gilmore, Ph.D., Administrative Specialist.

Oral and documentary evidence was received. The record was held open for the submission of posthearing briefs, which were submitted by both parties on July 20, 1990. The record was closed and the matter was submitted for decision.

ISSUES

Issues identified by Petitioner Rachel Holland:

1. Is the placement proposed by the Sacramento City Unified School District for the 1990-91 school year in the Severely Handicapped/Developmentally Delayed Special Day Class at Bear Flag Elementary School an appropriate placement and the least restrictive environment in which to implement Rachel's IEP goals and objectives?
2. If not, is full-time placement in a regular education class in the Interdisciplinary Arts Magnet Program with appropriate support services an appropriate placement and the least restrictive environment in which to implement Rachel's IEP goals and objectives?[1]

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[1] *The Interdisciplinary Arts Magnet Program is moving to Leonardo DaVinci School and will be entitled the "Interdisciplinary Curriculum/Arts Magnet" program as of September 1990.*

3. Are Rachel's parents entitled to reimbursement for the cost of independent assessments conducted by Nan Graham and Wendy Turnbull, Ph.D.?

Issues identified by the District:

1. Is the July 1989 assessment conducted by the Diagnostic Center for Neurologically Handicapped Children, Northern California appropriate?
2. Is the District entitled to update its assessment to determine Rachel's present levels of performance for each of the short-term instructional objectives?[2]

BACKGROUND

Rachel Holland is an eight-year-old girl with mild to moderate developmental disabilities. During the 1989-90 school year she attended kindergarten at Shalom School, a nonpublic, sectarian school. At Shalom, she was fully integrated with nonhandicapped children, she did not receive any special education services, and no significant modifications were made to the program to accommodate her.

Prior to attending Shalom, Rachel participated in District Preschool Learning Handicapped lasses from December 1985 through the summer of 1987. She initially attended Hubert Bancroft Elementary School, was moved by the District to Maple Elementary School in February 1986, and

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[2] *Following an observation by District represents of Rachel at Shalom during the course of the hearing, the District withdrew its request for a formal assessment of Rachel. However, the District continues to request that the receiving teacher be given the right to measure Rachel's current achievement toward IEP goals and objectives.*

later returned to Hubert Bancroft at the request of her parents. Rachel was integrated with regular education students for 15 minutes a day during the 1986-87 school year.

Rachel then attended a learning handicapped special day class (SDC) at Crocker-Riverside from the fall of 1987 through the 1988-89 school year. She was integrated for approximately 40 minutes a day during her first year at Crocker Riverside (1987-88). She also received 30-minute sessions of speech and language therapy twice a week from Janna Whitton, credentialed speech and language therapist. Ms. Whitton worked with Rachel both individually and in small groups. She frequently worked with Rachel in the classroom, particularly on auditory-memory goals.

Because Rachel's parents wanted her to interact at school with her nonhandicapped peers, they requested that she be integrated on a daily basis for instructional activities as well as for recess, lunch, and special events.

Following Rachel's triennial assessment in October 1988, Rachel's parents requested that the amount of Rachel's integration time be specified on her IEP. As a result, Rachel's integration time was increased from 40 minutes to 67 minutes. This IEP, however, was not signed by Rachel's parents (Petitioner's Exhibit 27), and by letter to the District on November 20, 1988, Rachel's parents requested certain additions to the IEP including program on disability awareness and abuse intervention for the school staff and students, and computer orientation for Rachel. (Petitioner's Exhibit 29)

Appendix I

In November of 1988, Rachel began integrating into Nancy Fast's regular education kindergarten class twice a week during free activity time, initially for 20-30 minutes each time. This was later extended to 45 minutes. Ms. Fast was not asked to nor did she implement Rachel's goals and objectives during the integration time.

During the 1988-89 school year, the District represented that Rachel was being integrated for one-half of her school day. When Rachel's parents questioned the nature of the integration, the District deemed the 165 minutes of integration time indicated on Rachel's IEP of January 3, 1989, a clerical error. Rachel's integration time actually average 67 minutes per day.

Rachel's parents persisted in their requests for more integration time for Rachel, based on research, familiarity with other programs, their belief in the benefits of integration generally, as well as their perception of the benefits to Rachel. Rachel's mother was of the opinion that the integration experiences were assisting Rachel to develop language and social skills as well as increasing her willingness to try new things. Dissatisfied with the District's response, Rachel's parents filed for a due process hearing on January 13, 1989, regarding the issue of integration. Per a mediation agreement reached on February 24, 1989, Rachel's integration time was increased to average 94 minutes per day. Also as a result of mediation, Rachel's parents agreed to an evaluation of Rachel, which subsequently was conducted over five days in July 1989 by the California Diagnostic Center for Neurologically

Handicapped Children, Northern California (hereafter "Diagnostic Center"). Rachel's parents and a number of District representatives participated in an exit interview with the Diagnostic Center on July 27, 1989.

During the summer of 1989, Rachel participated in a day camp program at Shalom. In the fall of 1989, Rachel's parents requested full-time placement in the Arts Magnet Program.[3] A brochure describing the program states, "At the Interdisciplinary/ Arts Magnet student study literature, language arts, social studies, math and science around units which interweave basic subjects with the arts and education for cultural inclusion. Arts, music, dance, and drama are integrated into lessons to enrich the program and address different learning styles. Creative and critical thinking is developed by multi-sensory and 'hands-on' learning experiences." (Respondent's Exhibit 61)

After attempting to conduct an IEP during the time the District teachers were on strike, Rachel's parents filed for a due process hearing on September 8, 1989, regarding the appropriate placement for Rachel for the 1989-90 school year.

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[3] *As a member of the CAC ad hoc committee, Kim Connor, Rachel's mother, had earlier recommended adoption of a proposal to establish a special education component at the Arts Magnet program. (The purpose of the Community Action Council (CAC) is to advise the special education division of the District on programs, to educate parents of special education rights and responsibilities, and to be involved in state and local plan development.) Rachel's parents and two other families indicated interest in enrolling their handicapped children in the proposed program and actually completed applications for that purpose. Ms. Connor believed the proposal had the support of the teachers as well as the school Parent/Teacher Committee.*

An IEP meeting was convened on September 13, 1989, at which time the District proposed placing Rachel in the learning handicapped SDC at Crocker-Riverside. Alternatively, the District offered to make an administrative placement in a severely handicapped class at Bear Flag. Rachel's parents chose instead to enroll Rachel in a regular education class at Shalom School, a nonpublic sectarian school.

On September 21, 1989, the District requested a due process hearing on the issue of the appropriateness of the District's educational assessment. After a series of IEP meetings and unsuccessful mediations, the District proposed placement at O.W. Erlewine Elementary School in a SH/DD class, with integration into a regular first grade class for opening activities, recess, P.E., art, music, and lunch. (Petitioner's Exhibit 93) In the interim, Rachel's parents contacted Wendy Turnbull, Ph.D., clinic psychologist, and Nan Graham, special education teacher and practicum supervisor at California State University, San Francisco, to conduct independent assessments of Rachel.

Goals and objectives were agreed upon at a mediated IEP on January 30, 1990. Short-term instructional objectives include: speaking in four-five word sentences using article, pronouns, adjectives and prepositions; repeating instructions of complex tasks; initiating and terminating conversations; verbally telling name, address, and telephone number; participating in personal safety program with classmates; developing a 24-word sight vocabulary; counting to 25 and using one-to-one correspondence; printing first and last name

and the alphabet; playing cooperatively; participating in lunch without teacher supervision; identifying upper and lower case letters and sounds associated with them; and following own pictorial/word schedule. (Petitioner's Exhibit 89)

By letter on March 14, 1990, the District notified Rachel's parents that, due to changes in enrollment in the District's SH/DD programs, the District was withdrawing its offer of placement at O.W. Erlewine and was instead offering placement in a SH/DD SDC at Bear Flag. After a lengthy and unsuccessful mediation, the primary issue for resolution by this hearing regards the appropriate placement for Rachel for the 1990-91 school year. Also at issue is the District's responsibility for payment of the two independent assessments mentioned above.

DISCUSSION OF RELEVANT EVIDENCE

Rachel's Current Levels of Functioning/Educational Needs

Rachel's parents assert that Rachel has benefited from the full-inclusion kindergarten program and has experienced rapid development over the past school year. They indicated that she is beginning to read, has a 20-word sight vocabulary, and notices words in the community. Rachel is able to write her name, count to 30, trace letters and numbers, recognize the alphabet in both upper and lower cases, sound out consonants, use "who, what, and where" questions, and speak in sentences of four and five words. Rachel is beginning to problem solve and make choices, has improved social interaction with her peers, and is very motivated to learn. Rachel enjoys being with

children and her parents believe that she learns from modeling the language and actions of the children around her.

According to Kathy Newton, Rachel's teacher at Shalom, no significant modifications were made to the program and the only assistance she gave Rachel to supplement classroom instruction was 15-20 minutes of one-on-one following each school day.[4] Ms. Newton stated that Rachel never presented any behavioral problems. She believed that Rachel benefited from the kindergarten class in that she made academic gains, became more independent, was more comfortable interacting socially with her peers, increased verbalizations, built her vocabulary, and improved gross motor skills. Ms. Newton based her opinion on informal observations of Rachel throughout the school year.

Nan Graham, an experienced teacher of severely handicapped students participating in regular education programs conducted an educational assessment of Rachel over the months of December 1989 through April 1990 and was called as an expert witness by Rachel's parents. The components of her assessment included gathering information from Rachel's family and teacher, and observing Rachel in her kindergarten class, at home, and in the community. Ms. Graham indicated that she also reviewed Rachel's school records and previous IEPs and worked individually with Rachel, although she admittedly did not administer any

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[4] *Rachel arrived at school later than the other kindergartners because she did not participate in Hebrew lessons.*

objective testing to determine Rachel's current levels of functioning.

Ms. Graham determined that in reading, Rachel is able to sit in the group, pay attention to the lesson, and participate in the activities with minimum modification. Rachel can say the letters of the alphabet, and is learning the sounds of the consonants. Ms Graham testified that Rachel is motivated by books and told Ms. Graham that when she grows up she wants to read. In math, Ms. Graham testified that Rachel understands one-to-one correspondence to ten, and is able to name numbers forward and backwards to ten, identifies numbers to 30, and traces numbers. In writing, Rachel traces letters and is able to write her name. Rachel is able to throw and catch a ball, but continues to have some trouble running and jumping. Rachel is motivated to do art activities, is able to cut around designs, and pastes. Paper and pencil tasks are laborious, but Rachel is willing to attempt them. Rachel is able to follow directions. In expressive language, Rachel uses three- to-four-word sentences, labels objects, uses action words, and is learning to express her feelings. Rachel's use of silly phrases such a "loose tooth" at inappropriate times has diminished and Rachel is initiating more conversations and asking more questions.

Ms. Graham described social interactions as Rachel's "strong area." Rachel enjoys being with children and adults. Regarding Rachel's attention span, Ms. Graham indicate that Rachel was attentive for 8-10 minutes at home, but noted that she was doing school activities and would rather have been playing. At school, Rachel had to be redirected once during

Ms. Graham observation, which covered 20 minutes of a reading activity in a circle and 20 minutes of a math activity at a desk. Ms. Graham testified that Rachel learns through imitation and modeling, has strong social skills and is motivated to learn. Dr. Wendy Turnbull, also called as an expert witness by Rachel's parents, agreed with Ms. Graham's findings and particularly was impressed by Rachel's ability to learn through imitation and modeling.

Ms. Graham recommended placement in a regular first grade classroom based on her observations of Rachel's ability to participate in a regular kindergarten, her strong social skills, and her motivation to learn. Ms. Graham believes that the regular education students would provide appropriate models, especially in language, from whom Rachel would learn. She indicated that Rachel requires occasional prompting, but she does not believe that Rachel would require an inordinate amount of time from the regular teacher.

In response to the witnesses who were called to testify by Rachel's parents, the District's representatives asserted that Rachel's educational needs cannot be met appropriately in any regular first grade class. Speaking for the District, Adolphus McGee, Director of Special Education, testified that the District has no reason to preclude children with different handicapping conditions from participation in regular education programs. He expressed concern, however, that regular education teachers are not credentialed to teach severely handicapped students and that Rachel's goals and objective are not part of the regular first grade curriculum. The

District asserts that because Rachel lacks the requisite ability to grasp concepts taught in the first grade, the curriculum would have to be modified to such an extent that it would become unrecognizable. The District also asserts that the instructional methodologies employed in the first grade (ie. unstructured, quickly building on new concepts, lack of repetition) would not provide Rachel an opportunity to learn. (Rachel requires repetition at a slower pace.) They further assert that Rachel's self-esteem would falter and she would become an "isolate" in the class.

Sol Froshnider, psychologist, administered the psychological portions of the Diagnostic Center assessment and Carol MacQuarrie, educational specialist, administered the education assessment portion. (Petitioner's Exhibit 59) Mr. Froshnider testified that the diagnostic team agreed that Rachel showed moderate developmental delays in speech and language and preacademic skills. He indicated that test results showed that Rachel is globally delayed in all dimensions related to educational concerns. Although the Diagnostic Center report indicates that Rachel worked for 15 minute periods, Mr. Froshnider indicated that Rachel's attention span was no more than a couple of minutes depending on the task. Mr. Froshnider testified that Rachel needs concepts repeated in a variety of settings so that she can transfer learning. She also needs a mediator to translate the environment to her own level so that it is simpler, easier to understand, an manageable. Mr. Froshnider recommended use of the critical skills teaching model where the parents and the District would collaborate to

determine Rachel's needs and how best to deliver those needs in the home, class, and community. Ms. MacQuarrie found that Rachel responded well to auditory prompting and was good at rote learning but had difficulty generalizing. She concluded that Rachel would benefit from the use of a multisensory approach to learning focusing on functional/survival, pre-academic self-help, and language skills.

On behalf of the District, Administrative Specialist Susan Gilmore testified that the score on all assessments, with the exception of the Peabody Picture Vocabulary Test (PPVT) administered by Dr. Wendy Turnbull, indicate a pattern of moderate retardation. (District's Exhibit 19 summarizes Rachel's test scores as recorded by Dr. Gilmore) Dr. Gilmore questioned the results obtained by Dr. Turnbull on the PPVT which indicated that Rachel had made a year's gain in seven months. Dr. Gilmore testified that the PPVT test instrument is a reliable measure resulting in consistent scores.[5] Dr. Gilmore testified at length regarding her observations of Rachel at Shalom and concluded that Rachel, while well-mannered and compliant, interacted to a limited extent with the children in her class, educationally lagged significantly behind the other

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[5] *The Hearing Officer notes however, that Rachel's PPVT scores obtained in July 1989 by the Diagnostic enter show a decrease from prior testing administered in September 1988. If the July 1989 scores are disregarded, Rachel's gains as measured subsequently by Dr. Turnbull are consistent with previous results.*

children, and derived little benefit from the class Dr. Gilmore noted that Rachel responded when given a direct prompt and that Rachel appeared to use longer sentences than in her earlier observation although she continued to use many one- and two-word utterances as well. Dr. Gilmore was of the opinion that Rachel was not successful in her previous integration experiences in the District and is not now successful at Shalom.

JoEllem Tropper, Rachel's former learning handicapped teacher at Crocker-Riverside, also testified that she did not believe the integration experiences benefited Rachel. She stated that after increasing the integration time, Rachel made very little progress on her IEP goals and objectives and regressed in the classroom. Ms. Tropper also expressed concern regarding Rachel's safety in the regular kindergarten class and asserted that Rachel started to drool, was disoriented, and unable to concentrate. She believed that Rachel was overwhelmed by the experience. Although Ms. Tropper expressed these concerns, she did not request an aide to assist Rachel in the kindergarten class because she was of the opinion that it would then not be "true mainstreaming." Ms. Tropper testified that Rachel needs structure and repetition in her learning environment.

Nancy Fast, into whose kindergarten class Rachel was integrated in 1988, indicated that she did not consult with anyone in the District regarding Rachel's integration, except Rachel's teacher, Ms. Tropper. She did not nor was she asked to implement Rachel's goals and objective. Ms. Fast indicated that she initially spent a considerable amount of time with

Rachel because Rachel would need to be directed to an activity or would quickly lose interest in an activity and move on to another. After a period, Ms. Fast assigned a buddy to Rachel. Ms. Fast stated that Rachel generally participated in the same activities when she came to the class unless redirected. Although Rachel watched the other children, Rachel generally played alongside\rather than with the other students, with the exception of one other child. Ms. Fast did not believe Rachel's socialization skills improved; however, she characterized the integration experience as successful.

Janna Whitton, Rachel's former speech and language therapist, testified that Rachel was successful when she worked in a small group and used lots of repetition. She also stated that Rachel learned by imitation. Ms. Whitton indicated that, during the two years she worked with Rachel, Rachel increased her mean length of utterance from 2 to 2.7 words and improved her ability to name objects, but had difficulty with auditory memory. She indicated that Rachel was using some 3- to 4-word utterances and was initiated some conversations in class.

Evelyn Margolin, camp director and special education teacher for the District, testified that Rachel fully participated in the program camp program this last summer, that she did not require any more instruction than other children in her age group, and that the other children fully accepted her.

District Proposed Placement in Special Day Class, Bear Flag

The District proposes placing Rachel in a severely handicapped/developmentally delayed (SH/DD) class at Bear Flag Elementary School with an average of 145 minutes per

day of formal integration with nonhandicapped first grade students. (See Respondent' Exhibit 18 for a proposed school of integration, prepared by Dr. Gilmore.) The District contends that placement at Bear Flag would allow Rachel to achieve success, enhance her self-esteem, and increase her academic and socialization skills. The District asserts that Rachel would have the opportunity to truly integrate and become a part of a regular education classroom during nonacademic activities while learning important other skills in the SDC from a teacher trained to work with severely handicapped children.

The Bear Flag SDC serves eleven students aged six through 10 years. (One witness testified that the age range extended to 12 years.) There is one teacher, Jeannie Legg, and two full-time aides in the class. The students are also assisted by two foster grandparents, several high school students, peer and cross-age tutors, and a buddy system with regular education students. The language skills of the students range from one child who has no spoken language to two children with good expressive language skills. The students are grouped by ability for math, reading, and language. Ms. Legg believed that Rachel would fall within the top group from each area. Other areas taught in the class include handwriting, recreation and leisure, and independent living. Music occurs daily in the class as well as with a regular education class. This past school year, the Bear Flag SDC students participated in STARTS (Students, Teachers, Artists Reaching, Teaching, and Sharing) a program which employs community artists to work with regular and special education classes on specific arts

projects. Ms. Legg testified that she uses modeling and a multi-sensory approach to teaching. Activities take place in small and large groups. Ms. Legg testified that she is committed to mainstreaming and testified that all of her students are mainstreamed to some extent. Ms. Legg would like to redesign her class to function as a resource room where severely handicapped students would work on functional and academic goals and would be in the regular classroom for socialization and practice.

Dr. Gilmore has observed the SDC on several occasions. She stated that the teacher uses a "thematic" approach to learning and the entire curriculum is "whole-language" based. Dr. Gilmore indicated that this means that the speech and language specialist works in the class to assist the teacher to expand the children's language abilities. She observed students communicating with each other and stated that their language ranged from one- and two-word utterance to five- and six-word sentences. Rachel's former teacher for two years, Ms. Tropper, supported SDC placement because Rachel would receive one-on-one attention and the opportunity to practice skills she is taught.

Mr. Froshnider of the Diagnostic Center recommended SDC placement because the class size is smaller, the teacher is specially trained to meet the needs of handicapped children, an the instruction is geared to the need of handicapped children, and the instruction is geared to the needs and pace of learning of the developmentally delayed. Mr. Froshnider based his

recommendations on test results as well as a visit to Bear Flag although, at the time of his visit, there was a substitute teacher.

Rachel's parents believe that a SDC is an inappropriate placement for Rachel. Of particular concern to them is the lack of appropriate language models and the poor behavior models the other students would provide for Rachel. They also expressed concern about the limited interaction that occur between the students. They further assert that the daily activities, as shown on the classroom schedule, included watching television and table setting, which are inappropriate for Rachel.

Ms. Graham, the expert witness called by Rachel's parents, testified that after two visits to the Bear Flag SDC, she was of the opinion that the proposed placement would not be appropriate for Rachel. She stated that the curriculum in the SDC would not be academic enough for Rachel and that it would need to be modified to accommodate her. Ms. Graham suggested that accommodations in the curriculum would include beginning reading, pencil and paper activities, and math activities. Ms. Graham also expressed concern regarding the lack of appropriate language models and the possibility that Rachel would model any inappropriate behavior exhibited by the students in the classroom. She noted during her observation of the class that all conversations occurred between the teacher and the students rather than between students. Ms. Graham was also critical of the proposed integration schedule because of the number of transitions between the SDC and the regular class.

Parent's Proposed placement at Leonardo DaVinci Interdisciplinary Curriculum/Arts Magnet

Rachel's parents contend that Rachel should be fully included in a regular first grade class preferably in the Arts Magnet program, and that all support services should be provided within the classroom. They assert that placement in a first grade class is the logical step for Rachel following kindergarten in an integrated setting. They assert that placement in a first grade class can be successfully accomplished with the use of part-time support personnel.

The Arts Magnet program is designed to meet all first grade District requirements through integration with the arts. Clyde Kidd, former principal at Theodore Judah School, stated that the Magnet Program provides students with the opportunity to integrate into a heterogeneous group; students are not tracked or screened prior to placement in the program. Mr. Kidd stated that rather than using a traditional textbook approach to learning, a theme is selected for each unit and lessons are planned to illustrate concepts through a variety of methods. He described the program as less structured than traditional classrooms and based on "hands on" experiences. He also stated that the students are given more independence than in a traditional classroom. Parent-volunteer time is required by the program.

Ms. Graham indicated that Rachel should have a support team consisting of the regular education teacher, Rachel's parents, a special education teacher or consultant, a part-time classroom aide, and the speech and language therapist

as appropriate. The role of the special education teacher would be to evaluate Rachel's need for support in the relation to the class curriculum and schedule, consult with the regular education teacher, develop adaptations, share information with the staff, and monitor Rachel's progress. Ms. Graham does not believe that a special education teacher is needed full-time for Rachel. Ms. Graham recommended that the aide assist Rachel primarily during small group work and individually to a lesser extent. Ms. Graham also recommended that a disability awareness program be implemented for all staff and students and that the Circle of Friends be used with the students in Rachel's class. Dr. Turnbull made similar recommendations.

Twice weekly, for 45 minutes each, students from all of the classes participate in SLATE, an interdisciplinary arts program. Ms. Connor, Ms. Graham, and Dr. Gilmore all noted that Rachel appears to enjoy activities related to music. Other weekly activities include a 45-minute computer lab (one-half of the students attend at a time), library, and physical education. Use of the computer would be consistent with Rachel's goals and objectives and was recommended by Ms. Graham in order to assist Rachel in keeping up with writing activities. Dr. Turnbull pointed out that use of the computer would assist Rachel to do tasks that would otherwise be difficult or time-consuming for her due to poor fine motor coordination.

Regarding adaptations, required to implement the goals and objectives from Rachel's current IEP, Ms. Graham, Dr. Turnbull, and Ms. Connor testified that Rachel would require a minimum amount of modifications to the first grade program.

Ms. Newton testified that she was able to adapt instructional materials for Rachel at Shalom without any specific training. District witnesses disagree with the amount of modification that would be required. It should be noted, however, that in the past the District did little to support Rachel's integration and thus did not have experience in modifying a regular education program for Rachel.

Louise Zabriskie, a teacher at West Davis Elementary School, has one severely handicapped child fully included in her first grade class. She believed that both the special education and the regular students have benefited from the experience, which she characterized as successful. She indicated that she utilized the same curriculum theme and adapts it to the appropriate level for the special education student. Ms. Zabriskie had met Rachel for two hours and testified that many of her goals are similar to those Ms. Zabriskie has for some regular first graders. She was of the opinion that Rachel's IEP could be implemented in a regular first grade classroom.

Tom Neary, trainer for the State Department of Education, indicated that training and technical assistance could be provided at no cost to the District to assist it to develop a full-inclusion program. He was of the opinion that the best learning environment for Rachel would not be a special day class.

Sharon Helmar, one of the first grade Arts Magnet teachers, was called as a witness by the District. She indicated that the other first grade classes operate similarly to hers. Ms.

Helmar believed that Rachel, in the company of an aide, would have a detrimental effect on the other children in her class because they would want the same attention, thus undermining the goal of developing self-reliant, independent children. Ms. Helmar has not had special education students integrated into any of her classes but she was of the opinion that children who do not achieve academically would require a lot of her time. On the other hand, Ms. Helmar believed that other children in the class would learn about strengths and weaknesses from Rachel. Ms. Helmar indicated that she already felt taxed by her job and in fact was looking for another teaching job.

Ms. Helmar testified that the program begins daily with a 15-minute morning sing in which all of the classes participate. This activity integrates music and reading. The teacher leading the sing signs the lyrics and points to the words of the songs which are displayed on a video screen. Ms. Connor testified that Rachel enjoys singing and would benefit from this activity. Dr. Gilmore believed that, during this activity, Rachel would be compliant but overwhelmed by too much stimulus with no one to cue her to what was expected of her. On the other hand, Ms. Newton, Rachel's teacher at Shalom, testified that Rachel learned the routine in her class and had no reason to believe that she would not also learn the routine at another school.

The children in Ms. Helmar's class all participate in a calendar activity into which math concepts are integrated. The calendar has extensive patterns to cue the students. For example, the teacher may ask "What is divisible by four?" If

the students look to the calendar, they discover that all numbers divisible by four have the same background color. Ms. Newton testified that Rachel's kindergarten class at Shalom had a daily calendar activity. Ms. Newton modified the activity so that Rachel traced the numbers on the calendar rather than independently writing them on the squares.

Ms. Helmar uses both a book and a hands-on program called "Math Their Way." Dr. Gilmore believed that the math tasks require significantly higher skills than those possessed by Rachel. However, Ms. Fast, the kindergarten teacher at Crocker-Riverside, stated that she uses the same program and indicated that the materials, at least at the exploratory level, would be appropriate for Rachel. Ms. Fast believed that the materials could be adapted to meet Rachel's needs as the lessons became more difficult. Ms. Newton also indicated that she adapted the math curriculum to Rachel's level. For example, when the other children in the class were doing addition work sheets, she had Rachel use stickers to indicate one-to-one correspondence on the same worksheet. Ms. Connor observed the children engaged in hands-on activities and believed that the activity would need only slight modification to be appropriate for Rachel.

Ms. Helmar testified that language arts are taught throughout the daily activities. The curriculum includes when to use upper case letters and periods, spelling, and putting words together to make sentences. Ms. Graham testified that these activities would meet instructional objectives of Rachel's current IEP. The literature curriculum includes ten books that

are read by the teacher and those children who are able to read. Ms. Connor indicated that Rachel was familiar with some of the books she observed in the classroom. She believed that Rachel could sit with the other children, listen, discuss the reading, and would benefit from the activity. During reading activities at the Arts Magnet program, Dr. Gilmore observe the teacher using the overhead projector to teach the word of the week, which he believed was too difficult for Rachel. Ms. Connor observed 12 students involved in a reading activity during which they were acting out words from a new story. Ms. Connor suggested that Rachel could be given a word from the story that would be appropriate for her reading level.

During a science activity, Dr. Gilmore observed the students decorating a box like an animal and then filling it with items related to that animal. Although some children wrote something about the animal they selected it was not a requirement of the lesson. If it were a requirement, Rachel could have dictated something about her animal. Ms. Connor indicated that Rachel would be able to complete this activity at her level.

Both Mr. Froshnider and Ms. MacQuarrie from the Diagnostic Center supported the District's position that Rachel's educational needs could not be meet in the Arts Magnet program. Mr. Froshnider was of the opinion that the pace would be too fast and the focus was on delivering prescribed curriculum to the students rather than meeting the needs of individual children. He also believed that the curriculum was too abstract for Rachel to comprehend and

expressed concern that she would sense her inability to succeed, resulting in an adverse effect on her psychological well-being. In Ms. MacQuarrie's opinion, the curriculum is inappropriate and Rachel is not functioning at the ability level of the other students.

The District contends that costs may be considered when making placement decisions and according to its calculations, the projected annual cost of the program as proposed by Rachel's parents and memorialized in the District's' Exhibit 46 would total $108,993, in comparison to approximately $70,000 for other severely handicapped children in the District. (District's Exhibit 15) In Dr. Gilmore's opinion, the special education consultant must be credentialed to teach severely handicapped students.

Dr. Gilmore was of the opinion that an aide in a regular first grade class would single out Rachel and could teach her to become dependent upon that person for assistance. Regarding the Circle of Friends program, Dr. Gilmore testified that rather than interpret how the program should be utilized the District prefers to bring in the developers of the program to provide an in-service program to District staff. She asserted that the parents' request in regards to ability awareness for students goes beyond the District's current programs and would therefore cause the District additional expenditures. Mr. McGee testified that the District will commence phasing "Hand in Hand," a disabilities awareness program, into the regular education curriculum this fall. Implementation of this program

would therefore not be a direct result of the regular education placement proposed for Rachel.

FINDINGS OF FACT AND LEGAL ANALYSIS

What is the appropriate educational placement for Rachel for the 1990-91 school year?

Under the Education for Handicapped Act (EHA) and state law, handicapped children are guaranteed the right to a free appropriate public education and, to the maximum extent appropriately, the right to be educated with nonhandicapped children. The United States Supreme Court, in Board of Education v. Rowley, 458 US. 175 (1982), defined "appropriate education" under the EHA as "access to specialized instruction and related services which are individually designed to provide educational benefit to the handicapped children." (458 U.S. at 201).

"Related services" are defined as "transportation, and such developmental, corrective, and other supportive services (including speech pathology and audiology...) as may be required to assist a handicapped child to benefit from special education." 20 U.S.C. Section 1401(17). Related services must be provided by a qualified individual (5 CCR 3051(a)(2)), must be individually designed, and must meet the benefit standard of Rowley.

The EHA also charges states with the responsibility of assuring that "to the maximum extent appropriate, handicapped children... are educated with children who are not handicapped, and that special classes, separate schooling, or other removal of handicapped children from the regular educational environment

occurs only when the nature or the severity of the handicapped is such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily." 20 U.S.C. Section 1412(5)(b). With this section, Congress created a strong preference in favor of mainstreaming. Roncker v. Walter, 700 F.2d 1058, 1063 (6th Cir. 1983), cert. denied, 464 U.S. 864 (1983).

Looking to the language of the statute regarding mainstreaming, the Court of Appeals for the Fifth Circuit in Daniel R.R. v. State Board of Education, 874 F.2d 1036 (5th Cir. 1989), employed a two-part inquiry to determine the extent to which a handicapped child must be mainstreamed. The initial inquiry is whether education in the regular classroom, with the use of supplemental aids and services, can be achieved satisfactorily for a given child; if it cannot and the school proposes Special Education or to remove the child from regular education, the second inquiry is whether the school has mainstreamed the child to the maximum extent appropriate.

In order to determine what is required to satisfy the mainstreaming requirement, a number of factors regarding the individual child must be considered, including the nature and severity of the child's handicap; the curriculum and goals of the regular education class; and the sufficiency of the District's efforts to accommodate the handicapped child in regular education. Additional factors to consider are whether the child will receive educational benefit from regular education and the effect the handicapped child's presence has on the regular

classroom environment and on the education that the other students are receiving.

The Daniel R.R. courts went on to note that "educational benefits are not mainstreaming only virtue. Rather, mainstreaming may have benefits in and of itself...although a handicapped child may not be able to absorb all of the regular education curriculum, he may benefit from nonacademic experiences in the regular education environment." In regards to the adequacy of the steps taken to accommodate the handicapped child in regular education, the court stated "the Act does not permit states to make mere token gestures to accommodate handicapped students; its requirement for modifying and supplementing regular education is broad." (874 F.2d 1048).

The District's past efforts to accommodate Rachel's needs in an integrated environment have not been sufficient. With the exception of Rachel's integration into Ms. Fast's kindergarten class during free play, the District's previous efforts to integrate Rachel have been limited to recess, lunch, and music. (Respondent's Exhibit 18) Rachel's integration into Ms. Fast's class occurred without the benefit of consultation with District special education personnel, support of an aide, or training. Ms. Tropper, Rachel's teacher, believed that true mainstreaming must occur without support, although she apparently did discuss Rachel on occasion with Ms. Fast. (Testimony of Ms. Fast, Ms. Connor, and Ms. Tropper)

Although the District is willing to integrate Rachel for an increased amount of time, the nature and quality of the

integration time is not an improvement over what was previously provided to her by the District. It does not appear that the District's proposed integration for Rachel at Bear Flag includes any supplemental support or services. The District proposes to move Rachel in and out of the SDC and the regular first grade class (or classes), carefully avoiding the possibility of integrating Rachel during any academic periods. In attempting to piece together a program based in a special day class but including integration responsive to the parents' request, the District has offered a confusing and disjointed program. The District raised concerns about the appropriateness and benefits of integration to Rachel, yet offered nearly one-half of Rachel's day in a regular class placement. The District's representatives also expressed a concern that the Arts Magnet program involves a lot of movement of students, yet they proposed to move Rachel at least six times during each school day. This inconsistency appears to center both on differing philosophies and the concern on the part of the District that allowing Rachel to be fully integrated in a regular classroom would open the floodgates to all special education students. This fear is unfounded insomuch as placement decisions are based on the unique needs of each individual handicapped child.

In the case at hand, the balance tips in favor of placing Rachel in a regular education classroom with the appropriate support services. Despite the District's concern that Rachel would be an "isolate" in a regular classroom and the fact that she is mild to moderately developmentally delayed, she has the

capacity to function with her normal peers as was shown this past school year at Shalom. Rachel benefited from her regular education placement. She developed socially, improved language development, increased her communication skills, and made academic growth without the benefit of a teacher trained to work with special education students or specific support services and with minimal modification to the regular kindergarten curriculum of Shalom. Although Dr. Gilmore testified that Rachel was not successful in her integration experiences in the District or at Shalom, the Hearing Officer gives greater weight to the testimony of Kathy Newton. Rachel's teacher at Shalom, who saw Rachel make progress over the course of the school year. In addition, the Hearing Officer notes that District teacher Nancy Fast characterized Rachel's integration experience into a regular kindergarten class as successful.

Rachel's experiences in Ms. Newton's kindergarten class have laid the foundation for Rachel's emerging language and social skills. Rachel is currently motivated and interested in learning. There is evidence that this is a result of placement with her regular peers. (Testimony of Ms. Graham, Dr. Turnbull, and Ms. Connor) Rachel learns by imitation and modeling, as well as from repetition. (Testimony of Ms. Connor, Dr. Turnbull, and Ms. Graham) The regular first grade students would provide good models for Rachel, particularly for language and social development. The Arts Magnet program specifically employs a multi-sensory and hands-on approach, deemed appropriate for Rachel by

witnesses testifying on behalf of both the District (testimony of Ms. MacQuarrie) and Rachel.

All of the witnesses agreed that Rachel is compliant, does not pose a behavioral problem, and responds to verbal prompting. Rachel is able to sit in a group and requires minimum intervention. (Testimony of Ms. Graham, Ms. Newton, and Ms. Margolin) Ms. Helmar's fear that her other students would become less independent because Rachel receives assistance is without merit. Ms. Fast and Ms. Newton testified that having Rachel in their classes provided benefit to the other students. They both indicated that her presence in the class increased awareness and sensitivity on the part of the other students. Ms. Helmar also foresaw this as a benefit of Rachel's inclusion in her class. There is no evidence that Rachel's participation in a regular education classroom would be other than beneficial to the regular students.

The District expressed a concern that Rachel would not comprehend the first grade curriculum. The District's first grade curriculum focuses on language development, introductory reading, and developing foundations in math, science, art, and music, which are wholly consistent with Rachel's IEP goals and objectives. Ms. Zabriskie testified that Rachel's goals are similar to those of some first graders in her class at Davis. Ms. Newton and Dr. Turnbull indicated that even though Rachel's level of academic achievement falls at a lower level than that of the other first grade students, her goals and objectives are not inconsistent with the first grade curriculum and adaptations could readily be made to the

classroom activities and materials to make them appropriate for Rachel.

In Daniel R.R., the Fifth Circuit Court of Appeals recognized that some handicapped children may not be able to master the regular education curriculum but added: "This does not mean, however, that those handicapped children are not receiving any benefit from regular education. Nor does it mean that they are not receiving all of the benefit that their handicapping condition will permit. If the child's individual needs make mainstreaming appropriate, we cannot deny the child access to regular education simply because his educational achievement lags behind that of his classmates." (874 F.2d at 1047)

Rachel is beginning to read and has a sight vocabulary of 20 words. She writes her name, traces letters and numbers, knows the alphabet in both lower and upper cases forms, and can identify many initial consonant sounds. (Testimony of Ms. Connor, Ms. Graham, and Ms. Newton) The Hearing Officer believes that Ms. Helmar's testimony is an accurate description of the first grade Arts Magnet program. Ms. Helmar's perspective towards integrating Rachel into her class, however, may differ from that of other teachers who do not feel as taxed by their current situation as she does. Ms. Helmar appeared very uncomfortable with the prospect of attempting to meet Rachel's individual needs and concerned about the amount of individual attention Rachel would require. For these reasons, the Hearing Officer fins that Ms. Helmar's testimony regarding the high functioning of her students and her inability to meet

individual students' needs was not convincing with regards to other first grade teachers in whose classes Rachel could be placed.

The evidence establishes that regular education placement for Rachel for the 1990-91 school year satisfies the element of the mainstreaming requirement of 20 U.S.C. Section 1412(5)(B) as discussed in Daniel R.R. Regular education placement also satisfies the benefit requirement as defined in Rowley. Therefore the appropriate placement in which to implement Rachel's IEP is in a full-time placement in a regular first grade class with support services including a part-time special education consultant and a part-time instructional aide. Because of the evidence concentrated on the Arts Magnet program and because the parents have expressed particular interest in the program, placement is recommended there for the 1990-91 school year. It would be in Rachel's best interest, as well as the District's, to place Rachel in a classroom with a teacher who is receptive to working with children having individual and unique needs.

It appears that the District has overstated Rachel's support requirements and, thereby, the costs of services that would be required to support Rachel's placement in a regular first grade class. The District undoubtedly will incur some additional expense by educating Rachel in a regular classroom. However, these costs are not so great as to weigh against placing Rachel in a regular education program. The District already has in place the majority of the supportive services required by Rachel. The "Circle of Friends" is available to the

District and, according to Bear Flag SDC teacher Ms. Legg, is easily implemented. Should the District prefer to conduct an in-service training program for its personnel, the cost of the in-service should not be attributed solely to Rachel. Teachers and aides from schools through the District will participate and benefit from the training. The District also has the option of contacting the state to request training at no cost. (Testimony of Mr. Neary) "Hand-in-Hand" has already been adopted for use in the District. (Testimony of Mr. McGee).

Speech and language therapy was identified as a service on Rachel's IEP of January 1990 and would be provided to Rachel whether she was in a SDC or regular class placement. Peer cross-age tutoring programs, which were recommended by Ms. Graham to assist Rachel during some activities, have been formed in many District schools and students could be enlisted to assist Rachel in an integrated setting as easily as in an SDC. The Arts Magnet program requires parent volunteer time. Rachel's parents have indicated that they intend to fulfill this requirement and would be available to assist Rachel.

Petitioner asserts that a trained special education consultant and a classroom aide are also available in the District. This may be true, but whether either would be available to provide the support needed by Rachel is unknown. Rachel does not require constant monitoring by a special education specialist. However, such a person should be available to consult regularly with Rachel's teacher on a part-time basis. The specific amount of time depends on the experiences and comfort level of the regular education teacher

in whose class Rachel is placed. (Testimony of Ms. Graham) A part-time classroom aide must also be provided to assist the regular education teacher to make adaptations to curriculum materials, to provide Rachel with one-on-one instruction, and to assist her during group activities.

It is difficult at this time to determine the exact amount of time that Rachel will require support from either the special education specialist or the classroom aide. Ms. Graham suggested that the support team, including the regular education teacher, Rachel's parents, the speech and language therapist, and the special education specialist and classroom aide, if known, meet to define the specific support required. Therefore, the Hearing Office hereby retains jurisdiction over this case pending agreement regarding the specific number of hours required by the District support personnel to facilitate Rachel's placement in a regular first grade class. Should an agreement not be reached by the parties one week prior to the commencement of the 1990-91 school year, the parties shall submit their specific proposals regarding the number of hours proposed for the special education specialist and the classroom aide to the Hearing Officer by August 31, 1990, for a final decision to be made. The Hearing Officer may then choose to hold a telephone conference with the parties to discuss their proposals.

Independent Assessments

Under California Education Code Section 56329(b) and Federal Regulations 34 C.F.R. Section 300503(b), parents have the right to obtain an independent educational evaluation of

their child at public expense if they disagreed with the District-obtained evaluation. A school district may initiate a hearing under the same section to show that its evaluation of a Special Education student is appropriate. In order for the District's assessment to be appropriate, it must meet the requirements of California Education Code Section 56320 which states that the assessment must draw information from a variety of sources, use validated test instruments designed to assess specific areas of educational need, and be administered by trained personnel.

Rachel's parents request reimbursement from the District for costs they expended in obtaining independent assessment from Nan Graham and Dr. Wendy Turnbull. They assert that the assessment conducted by the Diagnostic Center did not address the questions they raised regarding integration, that an assessment plan was not developed prior to the assessment, and that no one fully explained which tests would be administered during the assessment. Ms. Connor believed that the Diagnostic Center would assess Rachel's strengths and weaknesses, determine how she could best learn, and recommend elements to include in a curriculum for Rachel to enhance her learning Rachel's parents assert that, had they known that a placement recommendation was going to be made based upon IQ testing, they would not have consented to the assessment. Ms. Connor also disagrees with a number of the findings by the Diagnostic Center and disputes their recommendation of a functional skills curriculum.

The District asserts that the assessment made by the Diagnostic Center was appropriate, which would relieve the

District of any obligation to reimburse Rachel's parents for either of the independent assessments obtained by them. The District procured a form assessment plan from the Diagnostic Center, signed by Rachel's parents. The form indicates areas of assessment that would be covered during the assessment and by whom each would be conducted. Both of Rachel's parents were present during the several days of assessment at the Diagnostic Center and viewed the assessments in progress but apparently did not voice their objections at the time.

A number of instruments and procedures were used to assess Rachel. Over the five days of assessment at the Diagnostic Center, Rachel had an audiological evaluation at the San Francisco Hearing and Speech Center, pediatric, psychological, speech and language, educational and occupational therapy evaluations. For the most part, these evaluations included validated test instruments. The psychological assessment included the Kaufman Assessment Battery for Children, the Leiter International Performance Scale, two subtests of the Wechsler Preschool and Primary Scale of Intelligence, and the California Adaptive Behavior Scale. Rachel's speech and language was evaluated utilizing the Peabody Picture Vocabulary Test-Revised, the Expressive One-Word Picture Vocabulary Test, and the Boehm Test of Basic Concepts-Preschool. The educational assessment portion included the Test of Early Reading Ability, the Test of Early Learning Skills, the Developmental Activities Screening Inventory, the Berry Test of Visual-Motor Integration, and the Woodcock-Johnson Psycho-Educational Battery. In addition,

the assessment team observed Rachel throughout the assessment and consulted with her parents. (Petitioner's Exhibits 52-56 and 59)

Mr. Froshnider and Ms. MacQuarrie testified that assessment instruments were selected to provide information regarding Rachel's specific educational needs and were administered by a qualified, trained and experienced multidisciplinary team. Mr. Froshnider has 35 years of experience as a psychologist and has administered approximately 1500 psychological assessments. Ms. MacQuarrie is an experienced educator and has administered educational assessments to approximately 300 children. Other members of the assessment team included Earnest Lewis, M.A., consultant in clinical audiology, Lynn Roberts, speech, language, and hearing specialist, Barbara Bennett, M.D., pediatrician, and Janet R. Down, M.S., O.T.R.

The fact that an ecological assessment (an evaluation of the child in a number of environments including home, school, and community) was not a part of the Diagnostic Center's evaluation of Rachel does not mean that the assessment is incomplete. Nor is the assessment invalidated by the fact that it does not fully discuss interaction strategies for Rachel. It is unfortunate that Rachel's parents believed that their questions regarding integration were not addressed by the Diagnostic Center report. However, they were given opportunities throughout the testing and at the exist interview to again pose their questions to the assessment team.

The evidence established that the Diagnostic Center's assessment of Rachel was based on a variety of sources, including validated tests instruments designed to assess Rachel's specific educational needs, and administered by trained personnel, thereby satisfying the requirements of an appropriate educational assessment as defined in California Education Code Section 56320 Because the District has met the burden of showing that the Diagnostic Center's assessment of Rachel was appropriate, it is not obligated to reimburse Rachel's parents for either Ms. Graham's or Dr. Turnbull's assessment. It is not necessary to evaluate the appropriateness of either independent assessment.

Supplemental Assessment

Consistent with the District's revised request to be allowed to complete some type of assessment of Rachel's current levels of functioning prior to school stating in the fall and in order to assist the first grade teacher to prepare for Rachel, the teacher in whose class Rachel is placed shall assess Rachel as to her achieve towards the goals and objectives of her IEP of January 1990.

ORDER

1. The District shall place Rachel Holland in a regular first grade class, preferably in the interdisciplinary Curriculum/Arts Magnet Program, for the 1990-91 school year, with appropriate support services including a part-time special education consultant and a part-time classroom aide.

2. The parties shall meet to determine the number of hours each week that Rachel will require support from the special education consultant and classroom aide. Should they fail to reach agreement one week prior to the commencement of the 1990-91 school year, the parties shall submit their specific proposals which set forth the number of hours required from these support personnel to the Hearing Officer by August 31, 1990.
3. The request by Rachel's parents for reimbursement for independent assessment conducted by Nan Graham and Dr. Wendy Turnbull is denied
4. Rachel's parents shall allow the first grade teacher in whose class Rachel is placed to assess her achievement towards the goals and objectives of her IEP of January 1990 within the first two weeks of school.

DATED: August 14, 1990

Mary L. Cote, Hearing Officer
California Special Education Hearing Office

Supreme Court, U.S.
FILED
MAY 23 1994
OFFICE OF THE CLERK

No. 93-1804

In The

Supreme Court of the United States

October Term, 1993

SACRAMENTO CITY UNIFIED SCHOOL DISTRICT BOARD OF EDUCATION,

Petitioner,

v.

RACHEL HOLLAND, by and through her guardian ad litem, ROBERT HOLLAND, et al.,

Respondents.

Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

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QUESTION PRESENTED

The state respondents contend that there are no issues appropriate for review.

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STATEMENT OF THE CASE

Respondents adopt the Ninth Circuit's statement of "Facts and Prior Proceedings", Petition, pages 10a through 16a.

SUMMARY OF THE ARGUMENTS

The petition, herein, is not about a split in the circuits. Rather, it is a factual dispute.

Rachel Holland, the subject of this dispute, is a child with an I.Q. of 44, entitled to receive special education and related services under the Individuals With Disabilities Education Act (IDEA), 20 U.S.C. § 1400 *et seq.* Based upon predictions about Rachel's I.Q. obtained from standardized testing, petitioner's witnesses testified that Rachel's ability to be mainstreamed and to keep pace with regular education pupils, to generalize her learning experiences, and to benefit from the modeling of her regular classmates was doubtful. *Fortunately* for Rachel and many pupils like her, the IDEA requires an analysis beyond standardized test results to determine a pupil's unique needs and abilities. Unfortunately for petitioner, the IDEA does not support its reliance upon generalized predictions about pupils that are based solely upon the nature of the pupils' disabilities.

The Ninth Circuit and the district court, after reviewing the petitioner's I.Q.-driven testimony and predictions, concluded that Rachel's fact-based performance contradicted generalized assumptions about her retardation. Even assuming, for the sake of argument, that there

is a split among the circuits on how to determine the need for mainstreaming, under any test the result would be the same – Rachel demonstrated that she can benefit from mainstreaming.

Masking this factual dispute, petitioner misstates the holdings below and the law to create a split where none exists. The petition must, therefore, be denied.

REASONS FOR DENYING THE WRIT

I

PETITIONER CREATES A SPLIT WHERE NONE EXISTS

A "three-way split among the circuits" is nothing more than an artifact of petitioner's selective reading of the cases and its distorted briefing. The Ninth Circuit's decision does *not* acknowledge a new balancing test that departs from already divergent tests. The Ninth Circuit merely acknowledged that it had not set a standard for its districts and approved a test that "employed factors found in both lines of cases." (Petition, page 20a.)

Petitioner's simplistic, black-letter-law recitation of the so-called tests employed by the Fifth, Sixth and Ninth Circuits[1] masks the striking similarities among the analyses employed to decide each of the factually distinct

[1] The so-called divergent tests are recited on pages 11 and 12 of the petition for writ of certiorari.

mainstreaming cases. That each circuit may have emphasized one factor over another is not indicative of divergent tests, but merely a natural result of the uniqueness of each pupil involved, the differing facts, and the differing concerns of the parties.

In accordance with the United States Supreme Court's definition of "appropriate education" in *Board of Educ. v. Rowley*, 458 U.S. 176 (1982), each of the circuits looked at the educational benefits to the disabled pupil. *Roncker v. Walter*, 700 F.2d 1058, 1063 (6th Cir. 1983) ["The proper inquiry is whether a proposed placement is appropriate under the Act."]; *Daniel R.R. v. State Board of Education*, 874 F.2d 1036, 1047 (5th Cir. 1989) ["Thus, the decision whether to mainstream a child must include an inquiry into whether the student will gain any educational benefit from regular education."] Adopting the district court's analysis, the Ninth Circuit also started with a determination of the educational benefit to Rachel.

But each of the circuits recognized that the *Rowley* inquiry of educational benefit is insufficient when addressing the issue of mainstreaming. Acknowledging that "appropriate" and "least restrictive environment" (i.e. "mainstreaming") are separate and distinct entitlements of the IDEA, and that Congress placed equal emphasis on both, the circuits looked to a number of factors that must be considered to strike a balance between these important entitlements.

Thus, each of the circuits also addressed the non-academic benefits of mainstreaming to the individual pupil. *Roncker, supra* 700 F.2d at 1063 ["In some cases, a placement which may be considered better for academic

reasons may not be appropriate because of the failure to provide for mainstreaming."]; *Daniel R.R., supra,* 847 F.2d at 1047-1048 ["Our analysis cannot stop here, however, for educational benefits are not mainstreaming's only virtue. Rather, mainstreaming may have benefits in and of itself. For example, the language and behavior models available from non-handicapped children may be essential or helpful to the handicapped child's development."] Again, adopting the district court's analysis, the Ninth Circuit also weighed the non-educational benefits of mainstreaming, in addition to the educational benefits.

Each circuit also considered the factor of the effect of the disabled pupil on the regular classroom environment. *Roncker, supra,* 874 F.2d at 1063 ["The Act does not require mainstreaming in every case but . . . [requires that] mainstreaming be provided to the maximum extent appropriate. . . . Framing the issue in this manner accords the proper respect for the strong preference in favor of mainstreaming while still realizing . . . that some . . . children . . . must be educated in segregated facilities . . . because the handicapped child is a disruptive force in the non-segregated setting."] *Daniel R.R., supra,* 847 F.2d at 1049 ["Finally we ask what effect the handicapped child's presence has on the regular classroom environment. . . . "] So too the Ninth Circuit considered the effects of Rachel's presence on the teacher and children in the regular class.[2]

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[2] Contrary to petitioner's assertion, the district court did not ignore the extent of curriculum modifications in the regular classroom, but stated that such had no independent significance unless it bears on the other factors, *e.g.* teacher time or cost. (Petition, page 37a.)

Finally, consideration of the resources of the school districts was also addressed by each circuit. *Roncker, supra* 700 F.2d at 1063 ["Cost is a proper factor to consider since excessive spending on one handicapped child deprives other handicapped children. . . . Cost is no defense, however, if the school district has failed to use its funds to provide a proper continuum. . . . "]; *Daniel R.R., supra,* 847 F.2d at 1048 ["Although broad, the requirement is not limitless. States need not provide every conceivable supplementary aid or service to assist a child."][3] The Ninth Circuit, addressing the issue of cost that *was raised by petitioner,* affirmed the district court's conclusion that petitioner had failed to meet its burden of proving that Rachel's placement was unduly costly.

While the Fifth and Ninth Circuits "balanced" these various factors (*see Daniel R.R., Id.,* at 1048, "Ultimately, our task is to balance competing requirements of the [IDEA's] dual mandate. . . . "), the Sixth circuit asked lower courts to "consider" or "determine" these various factors (*see, e.g., Roncker, supra,* 700 F.2d at 1063). Whatever the description of the process used by each circuit, the Ninth Circuit's "balancing test" does not differ from the analysis employed by the others.

There being no divergent tests, the petition must be denied.

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[3] At page 1049, footnote 9, the *Daniel R.R.,* court pointed out that cost, *per se,* was not an issue in the case before it.

II

PETITIONER MISSTATES THE NINTH CIRCUIT'S VIEW OF STANDARDIZED TESTING AND MISSTATES THE LAW

Petitioner's assertion that the Ninth Circuit rejected standardized aptitude and achievement testing is specious. Neither the Ninth Circuit nor the district court eschew the value of standardized testing. Rather:

> the court noted that *the District's evidence focused on Rachel's limitations. . . .* The court concluded that the differing evaluations in large part reflected the *predisposition of the evaluators.*

Petition, pages 13a and 14a. Emphasis added.

Even a cursory reading of the district court's decision reveals that it did not criticize standardized testing. Rather, it disagreed with the use of the testing results by the witnesses for petitioner: "The [District's] witnesses do not believe that a child with Rachel's I.Q. can be effectively educated in a regular classroom." (Petition, page 39a.) Similarly, the Ninth Circuit noted, "The District has consistently taken the view that *a child with Rachel's I.Q. is too severely disabled to benefit from fulltime placement in a regular class.*" (Petition, page 18a. Emphasis added.)

Herein lies petitioner's Waterloo.

Petitioner's case was built upon assumptions about Rachel's capabilities as indicated by her measured I.Q. of 44.[4] Such controlling assumptions are in direct violation

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[4] These state respondents were and are horrified that its district, and its own diagnostic staff, would assert such

of the IDEA's prohibitions against the use of a sole criterion to determine a pupil's needs (20 U.S.C. § 1412(5)(C); 34 CFR § 300.532 (b) and (d)) and its mandate to consider a variety of factors when making placement decisions (34 CFR § 300.533). That the district court found Rachel's witnesses more credible is hardly surprising, for they relied upon tangible evidence of *Rachel's* performance and abilities, rather than on generalized predictions about how retarded children ought to perform. The Ninth Circuit appropriately left undisturbed the finding that Rachel's witnesses were more credible.

Petitioner's protestations that disabled pupils will, under the Ninth Circuit's tests, be doomed to fail repeatedly in the regular class before appropriate segregation can occur is nothing but fantasy. The Ninth Circuit's decision merely recognizes what the IDEA already requires and districts already follow in making placement decisions: That a variety of factors, including standardized testing and observation of actual performance, must be considered.

The message that a school district can properly divine from the Ninth Circuit's holding is that if one makes decisions based solely upon predictions of standardized tests, ignoring the pupil's unique needs and abilities, one violates the Act.

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assumptions after seventeen years of implementation of the IDEA, especially in view of the fact that full inclusion of severely handicapped pupils in California is common and routinely funded by the State.

Petitioner is not entitled to certiorari for its misstatement of the Ninth Circuit's ruling and the law.

III

PETITIONER MISSTATES THE IMPORTANCE THE NINTH CIRCUIT PLACED UPON SOCIALIZATION AND MINIMIZES THE EMPHASIS CONGRESS PLACED UPON MAINSTREAMING

Nowhere, as petitioner misstates, did the Ninth Circuit hold that "the disabled child's socialization is more important than her education." (Petition, page 18.) Rather, as did the Sixth Circuit in *Roncker, supra,* 700 F.2d at 1063, the district court merely noted that "the Act's requirement of integration . . . is not overcome by a showing that a special education placement is academically superior. . . . " (Petition, page 18.) The district court accurately reflected the language of 20 U.S.C. § 1412(5)(b) which requires that a child only be removed from the regular educational environment when his or her education there "cannot be achieved *satisfactorily.*" [Emphasis added.]

A "satisfactory education" is not only consistent with the language of the IDEA, but also with the Supreme Court's definition of "appropriate" in *Rowley, supra.*[5] As

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[5] As the Fifth Circuit noted: "States must tolerate educational differences; they need not perform the impossible and erase those differences. . . . [T]he Act accepts the notion that handicapped students will participate in regular education but that some of them will not benefit as much as nonhandicapped students will." *Daniel R.R., supra,* 874 F.2d at 1047.

all of the circuits have recognized, the IDEA's requirements for "appropriate education" and "mainstreaming" are equally important considerations that require a balancing, consideration, or determination of a number of factors. The social benefits as well as a satisfactory level of educational benefit are important factors.

CONCLUSION

This Court should not be persuaded by petitioner's dupery. The assertion that "[t]he IDEA itself provides a tangible and workable limit . . . " on mainstreaming (Petition, page 20), or that *Roncker* and *Daniel R.R.* identify tangible limits, whereas the Ninth Circuit's decision sets none (Petition, pages 12-13) is specious. A decision to mainstream or not is complex and fact-specific, and the focus of each analysis will vary with each child. As the Fifth Circuit stated:

> A variety of factors will inform each stage of our inquiry; the factors we consider today do not constitute an exhaustive list of factors relevant to the mainstreaming issue. Moreover, no single factor is dispositive in all cases. Rather our analysis is *an individualized, fact specific* inquiry.

Daniel R.R., supra, 874 F.2d at 1048.

Each of the circuits, including the Ninth Circuit, has focused on factors critical to the facts before them. All of the circuits' tests are strikingly similar. The divergence

among the circuits, if any there be, stems from the recognized uniqueness of each child – a recognition required by the IDEA, yet ignored by petitioner.[6]

Because there is no split among the circuits nor confusion in the law, the petition for writ of certiorari must be denied.

Respectfully submitted,

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[6] The district court, in closing, highlighted the individual nature of this decision making: "Children change, the educational demands on them change, and Rachel may change. If Rachel does not flourish under this placement in the future, then adjustments should be made. The IDEA forsees such adjustments at the annual IEP review." Petition, page 48a.

No. 93-1804

Supreme Court, U.S.
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In The

Supreme Court of the United States

October Term, 1993

SACRAMENTO CITY UNIFIED SCHOOL DISTRICT, BOARD OF EDUCATION,

Petitioner,

v.

RACHEL HOLLAND, by and through her guardian ad litem, ROBERT HOLLAND; WILLIAM HONIG, CALIFORNIA STATE SUPERINTENDENT OF PUBLIC INSTRUCTION; CALIFORNIA STATE DEPARTMENT OF EDUCATION HEARING OFFICE, McGEORGE SCHOOL OF LAW; and MARY COTE, HEARING OFFICER,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

RESPONDENT RACHEL HOLLAND'S OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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36 pp

QUESTION PRESENTED

Should this Court review the concurrent findings of fact of the Court of Appeals, the District Court and the California Department of Education that respondent Rachel Holland receives substantial benefit from placement in a regular education class?[1]

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[1] The "Questions Presented" set forth in the Petition are not in fact presented by this case.

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No. 93-1804

In The

Supreme Court of the United States

October Term, 1993

SACRAMENTO CITY UNIFIED SCHOOL DISTRICT, BOARD OF EDUCATION,

Petitioner,

v.

RACHEL HOLLAND, by and through her guardian ad litem, ROBERT HOLLAND; WILLIAM HONIG, CALIFORNIA STATE SUPERINTENDENT OF PUBLIC INSTRUCTION; CALIFORNIA STATE DEPARTMENT OF EDUCATION HEARING OFFICE, McGEORGE SCHOOL OF LAW; and MARY COTE, HEARING OFFICER,

Respondents.

On Petition For Writ Of Certiorari
To The United States Court Of Appeals
For The Ninth Circuit

RESPONDENT RACHEL HOLLAND'S OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Respondent Rachel Holland opposes the Petition for Writ of Certiorari. Petitioner has not established any special or important reason for this court to review the decision below. Petitioner's Questions Presented are all predicated on a factual dispute that was resolved by the California Department of Education, U.S. District Court, and the U.S. Court of Appeals for the Ninth Circuit and

there is no conflict among the Circuit Courts raised by this case.

STATEMENT OF THE CASE

Rachel Holland was 7 years old when this litigation commenced in the Fall of 1989. She is "well behaved and popular", "enjoys school and is motivated to learn". Dist. Ct. Pet. App. G., p. 25a.[2] Rachel has moderate developmental disabilities. *Id.* Rachel attended a regular day-care program for non-disabled children in Sacramento, California, until she was three and a half. For the following three and a half years (until age seven), Rachel was placed in special education classes by the petitioner school district. Most of that time she had little or no opportunity to participate in regular education classes with non-disabled children.[3] Pet. App. I, pp. 56a-58a.

While Rachel was in special education classes, her parents repeatedly requested that she have opportunities to participate in regular classes with non-disabled children. After almost three years of requests, pursuant to a mediated agreement, the school district agreed to

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[2] The opinion of the United States Court of Appeals for the Ninth Circuit reported at 14 F.3d 1398 (January 24, 1994) is referred to herein at Ninth Cir. Pet. App. F; opinion of the United States District Court for the Eastern District (Levi, D.J.) is reported at 786 F. Supp 874 (March 2, 1992) is referred to herein at Dist. Ct. Pet. App. G; opinion of the California State Hearing Office is not reported. It is referred to herein at H.O. Pet. App. I.

[3] For a complete account of Rachel's educational history and the course of proceedings below, see California Department of Education Hearing Officer's Order at H.O. Pet. App. I, pp. 56a-61a and federal district court Judge Levi's decision at Dist. Ct. Pet. App G, pp. 25a-30a.

integrate Rachel into a regular kindergarten class for about one hour per day. Dist. Ct. Pet. App. G., pp. 26a. During the few months that this integration occurred, the regular teacher received no consultation from a special education teacher and no training or aide or other support. H.O. Pet. App. I, p. 81a.

Unsatisfied with the district's efforts to mainstream Rachel, in September, 1989 Rachel's parents initiated an administrative hearing to obtain placement in a regular class with supplementary special education services. They also enrolled Rachel in a regular kindergarten class in a private school, Shalom School.[4] The school district maintained that Rachel should remain in a special education class for a majority of the school day with some integration into a regular class. Dist. Ct. Pet. App. G., pp. 26a-27a.

Following an extensive 14-day state administrative hearing, with testimony from 20 witnesses, the California Department of Education hearing officer ruled in favor of the Hollands and ordered that Rachel be placed in a regular first-grade class with supplementary support services (a part-time aide and part-time consultation from a special education teacher) for the following school year. Dist. Ct. Pet. App. G., p. 28a.

In deciding in favor of a regular education class placement, the hearing officer considered information about Rachel from many sources, including Rachel's previous special education teacher, speech therapist, the school district's regular education teacher, assessors from

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[4] Rachel has remained at Shalom School during the pendency of the administrative and judicial proceedings. She is currently in a fourth grade class. Ninth Cir. Pet. App. F, p.11a.

the Diagnostic Center who administered standardized tests, Rachel's regular kindergarten teacher at the private school, the clinical psychologist and special education integration teacher who conducted independent evaluations for Rachel's parents, Rachel's day-camp director and mother.[5]

Drawing from this information, the California Department of Education, made a number of factual findings: (1) The District's past efforts to accommodate Rachel's needs in an integrated environment were not sufficient, and were without the benefit of consultation with special education personnel, support of an aide or any training; (2) Rachel benefitted from her full-time participation in the regular education placement at the private school (she developed socially, her language developed, communication skills improved and she made academic growth); (3) Rachel made progress on the goals and objectives in her IEP[6] and these goals and objectives are consistent with the goals for the first-grade class; (4) as a result of placement with regular peers, Rachel was motivated and interested in learning and learns from

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[5] See "Discussion of Relevant Evidence" in California Department of Education decision, H.O. Pet. App. I, p. 61a-68a.

[6] For each disabled child eligible for special education, IDEA requires that an Individualized Education Program (IEP) be developed and reviewed at least annually by a multi-disciplinary team including the child's parent and teacher. It contains, among other things, a statement of the annual goals and short-term instructional objectives for the individual child and criteria for determining at least annually whether instructional objectives are being achieved. The IEP also must specify the extent to which each child will be able to participate in regular educational programs. 20 U.S.C. § 1401(20); § 1414(a)(5). Also see § 1413(a)(11).

imitation and modeling as well as from repetition; (5) the District's proposed "pieced together" special and regular education program is "a confusing and disjointed program" involving moving Rachel in and out of regular class at least six times during each school day; (6) the regular first grade students would provide good models for Rachel for the following year; (7) the nature and quality of the integration time proposed by the District was not an improvement over what was previously provided and lacked any supplemental support or services for Rachel when the District would integrate her with non-disabled children; and (8) Rachel's participation in regular education would be beneficial to the regular students. Pet. H.O. Pet. App. I, pp. 81a-85a.

While the school district believed Rachel's integration experiences in a regular kindergarten class were unsuccessful, the hearing officer gave greater weight to the testimony of Karen Newton, Rachel's kindergarten teacher at Shalom School who testified that Rachel made progress over the course of the year in her class. H.O. Pet. App. I, p. 83a.

The school district appealed the decision of the California Department of Education to federal district court. In December 1991, Judge David F. Levi held an additional 3-day evidentiary hearing for the purpose of hearing evidence on Rachel's progress in her regular classes since the administrative hearing (first grade and part of second grade). Dist. Ct. Pet. App. G, p. 29a.

On March 2, 1992, Judge Levi affirmed the decision of the hearing officer and ordered that Rachel be placed in "a regular second grade classroom, with some supplemental services, as a full-time member of the class." (Dist. Ct. Pet. App. G., p. 48a) and made the following factual

findings: (1) Rachel receives "substantial academic benefits" in regular education; (2) all of Rachel's goals and objectives in her IEP can be achieved in the regular class with some curriculum modification and through supplementary aids and services; (6) Rachel made "very little progress" while in special education; (7) the school district failed to establish that the educational opportunities in the special education class were at least equal to or superior to those in the regular classroom for Rachel; (3) Rachel participated in all activities in the regular class; (4) the areas of emphasis in Rachel's IEP are the major areas of emphasis for the second grade class as a whole; and (5) there was no evidence presented that Rachel is a discipline problem at school or distracts other children or is too burdensome to the regular class teacher. Witnesses from both sides reported that Rachel is an "agreeable child who follows directions and is well-behaved". Dist. Ct. Pet. App. G, pp. 41a-44a.

In arriving at his findings, Judge Levi also considered testimony from a variety of sources including the administrative hearing record as well as court testimony by the Diagnostic Center assessors, school district administrators, Rachel's teachers, Rachel's mother, special education experts on the integration of children with disabilities into regular classes, and a California Department of Education special education consultant. In resolving conflicting testimony regarding academic progress, Judge Levi found the Holland and Department of Education's witnesses to be "more credible" based on their greater expertise and experience in evaluating disabled children placed in regular classrooms and their greater opportunity to observe Rachel over an extended period of time in normal circumstances. Dist. Ct. Pet. App. G, 40a.

Because of the conflicting expert testimony, Judge Levi found the testimony of Rachel's second grade teacher, Nina Crone, an "experienced, skillful teacher . . . [with] no partisan involvement in the controversy to be all the more important." Dist. Ct. Pet. App. G, pp. 40a-41a. Ms. Crone testified that Rachel made progress on her IEP goals; that Rachel is in many ways a typical second-grader; her communication abilities and sentence length are improving; that Rachel is eager to participate in class and is very motivated. Dist. Ct. Pet. App. G, p. 41a. Judge Levi also concluded that when Rachel was in the district's special education class she was "shuttled into regular education class for informal mainstreaming" and was "treated as an outsider" by the other children in the class. Judge Levi found that the school district's current proposal mirrored these past practices, and "would mark Rachel as an outsider, depriving her of the primary benefit of mainstreaming". Dist. Ct. Pet. App. G, p. 42a. In contrast, he found that Rachel is a "full member" of her regular class, is enthusiastic about school, and "relishes her new friendships" she has developed in regular class. Dist. Ct. Pet. App. G, pp. 41a-44a.

The school district appealed Judge Levi's decision to the Ninth Circuit Court of Appeals. On January 24, 1994, the Ninth Circuit affirmed the district court decision. The Ninth Circuit, in affirming, approved the factors the district court used in evaluating whether a regular class was appropriate for Rachel, reviewed the evidence Judge Levi considered in arriving at his decision and his reasons for finding the testimony of the Holland experts to be more persuasive. The Ninth Circuit unanimously affirmed the factual findings of the court below concluding that the

district court "conducted a full evidentiary hearing and made a thorough analysis." Ninth Cir. Pet. App. F, p. 22a.

The school district petitioned this Court for Writ of Certiorari on April 22, 1994. Respondent Rachel Holland, for the reasons set forth below, opposes the Petition.

SUMMARY OF ARGUMENT

In its petition for writ of certiorari, petitioner disputes the specific factual findings of the California Department of Education[7] and the district court which were affirmed by the Ninth Circuit and attempts to raise a conflict in the Circuit Courts which does not exist. The Ninth Circuit opinion is consistent with the sound reasoning of the other Circuits which have addressed the individual fact specific application of the mainstreaming requirements of the Individuals with Disabilities Education Act (IDEA) 20 U.S.C. §§ 1400, *et seq.*, and will not result in the hyperbolic, unsubstantiated consequences that the petitioner projects. The claim that the Ninth Circuit decision requires a "school district to categorically place its disabled children full-time in regular education, even if all indications suggest that particular children cannot progress in regular education," Pet. at p. 9, could not be more unsupported by the record and decisions in this case. The district court and the Ninth Circuit explicitly rejected categorical placements in favor of the individualized, fact specific determinations required by the

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[7] As this Court has noted, courts reviewing decisions of state educational agencies should give "due weight" to the administrative proceedings. *Board of Education of the Hendrick Hudson Central School District Board of Education v. Rowley*, 458 U.S. 175, 206 (1982).

IDEA. Dist. Ct. Pet. App. G, 32a, *Daniel R.R. v. State Board of Education*, 874 F.2d 1036, 1048 (5th Cir. 1989).

Likewise, there is nothing in either decision which would require "extended, painful and embarrassing failure" as the petitioner claims. Pet. at p. 9. Rather, the lower court decisions require an examination of the benefits of regular class placement.[8] In this case, the State Department of Education, the district court and the Ninth Circuit found that Rachel Holland experienced substantial benefits and success in regular education classes. It is not possible to justify the leap that petitioners make that failure is required or would be tolerated from the facts of this case or the decisions below. Petitioner's assertions throughout the petition, in essence, amount to a continuing dispute with the factual findings and the outcome of this case. It is well established that this Court will not "undertake to review concurrent findings of fact" by lower courts.[9]

The IDEA explicitly provides that children with disabilities be educated in regular classes unless "education

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[8] Judge Levi recognized that the regular class is appropriate for Rachel as long as she benefits. "If Rachel does not flourish under this placement, then adjustments should be made." Dist. Ct. Pet. App. G, p. 48a.

[9] *See* Fed. R. Civ. P. 52. In *Graver Tank & Mfg. Co., Inc. v. Linde Air Products Co.*, 336 U.S. 271, 275 (1949), the U.S. Supreme Court refused to reconsider questions of fact because this Court "cannot undertake to review concurrent findings of fact by two courts below in the absence of a very obvious and exceptional showing of error." *See also Berenyi v. District Director, Immigration and Naturalization Service*, 385 U.S. 630, 635 (1967); *Rogers et al. v. Lodge, et al.*, 458 U.S. 613, 623 (1982); *Branti v. Finkle, et al.*, 445 U.S. 507, 512 n.6 (1980); *Goodman et al. v. Lukens Steel Co., et al.*, 482 U.S. 656 (1986).

in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily." 20 U.S.C. § 1412(5)(B). In determining whether Rachel Holland could be satisfactorily educated in the regular education environment, the State Department of Education and the district court applied the facts of this case to the factors which have been identified by all of the Circuit Courts that have addressed the issue. These factors required an individualized assessment of whether Rachel Holland can receive academic and non-academic benefits in the regular education classroom, whether her presence is disruptive to other children or the teacher, and the costs of such placement. Ninth Cir. Pet. App. F, p. 12a.

After a fourteen day state administrative hearing involving 20 witnesses and a full evidentiary hearing in district court, both the California Department of Education and Judge Levi specifically found that Rachel Holland receives academic and non-academic benefit in the regular education classroom, that her presence is not disruptive to others in the class and that the district did not demonstrate that the cost of regular education would be significantly more expensive. Ninth Cir. Pet. App. F, p. 12a, 13a-16a and Dist. Ct. Pet. App. G, p. 38a-48a.[10] The school district "strenuously disagree[d]" with these findings in the Ninth Circuit. Ninth Cir. Pet. App. F, pp. 21a-22a. However, the Ninth Circuit refused to "disturb

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[10] This case did not require speculation about how Rachel might benefit from regular education placement. During the pendency of this case Rachel has been attending a private school fully integrated in regular education classes. Dist Ct. Pet. App. G, p. 26a. By the time of the district court trial, Rachel had completed kindergarten and first grade and was attending second grade. Dist. Crt. Pet. App. G, p. 29a.

the findings of the district court" *Id.* which it found "conducted a full evidentiary hearing and made a thorough analysis." *Id.*

Petitioner's first and fourth questions presented regarding the assessments by the petitioner's experts are simply another attempt to dispute these factual findings. Contrary to the assertion of petitioner, the district court did not disregard per se the tests conducted by the school district's experts, but rather after hearing from educational experts from both sides, as well as from Rachel's second grade teacher, the district court found the Holland's evidence to be more persuasive. Ninth Cir. Pet. App. F, pp. 13a-14a; Dist. Ct. Pet. App. G, p. 40a.

In its second question presented, the petitioner raises an issue which is simply not present in the record of this case. There is no evidence that Rachel was subjected to repeated failure in the regular education classroom, nor did the State Department of Education, the district court or the Ninth Circuit in any way suggest such a standard. All of petitioner's assertions about failure stem from its continuing dispute with the lower courts' refusal to accept the testimony of its witnesses that Rachel and all children like her cannot benefit from regular education.[11] This unsubstantiated prediction of failure was defeated in the face of Rachel's repeated success in regular education classes.[12] There is nothing in the decisions of the lower

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[11] The Ninth Circuit stated, "the district has consistently taken the view that a child with Rachel's I.Q. is too severely disabled to benefit from full-time placement in a regular class." Ninth Cir. Pet. App. F, p. 18a.

[12] At the time of the State administrative hearing, Rachel had completed kindergarten in regular education class. The

courts that requires that children with disabilities be subjected to repeated failure in regular education classes. The lower court decisions simply conform with current practice which requires that information from a variety of sources be considered to determine whether a child with a disability can be "satisfactorily educated" with supplemental aids and services in a regular education class.

Finally, petitioner in its third Question Presented, incorrectly characterizes the Ninth Circuit decision as creating a "new test" to determine compliance with IDEA's mainstreaming provisions. Pet. p. ii. First, the Ninth Circuit, in affirming the district court, did not create a "new test," but rather adopted the factors common to all the Circuit Court cases which have addressed the issue. As is clear from the Ninth Circuit's discussion of these decisions, all of the Circuit Courts have looked to the overall academic and non-academic benefits to the disabled child and the impact on the education of other children.[13] The 11th and 6th Circuits also consider the

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hearing officer concluded, based on all of the evidence including testimony from her regular and special education teachers, that Rachel made substantial progress in all areas and that her experience was "successful." H.O. Pet. App. I, p. 83a; Dist Ct. Pet. App. G, p. 41a. By the time of the district court trial, Rachel was in second grade. The Holland's educational experts, as well as Rachel's regular education teacher for second grade also testified to her progress and success in regular education classes. Dist. Ct. Pet. App. G, pp. 38a-41a.

The only "failure" in the record of this case is in the special education class offered by the district. The district court found that the program proposed by the district "mirrors in part the deficiencies of the previous program" Dist. Ct. Pet. App. G, pp. 41a-42a.

[13] Ninth Cir. Pet. App. F, p. 20a, footnote 5 citing *Daniel R.R. v. State Board of Education*, 874 F.2d 1036, 1048-49, *Oberti v. Board*

costs of regular education placement, a factor which was adopted by the district court and Ninth Circuit in this case.[14] There is absolutely no conflict posed in the Ninth Circuit decision.[15]

The "balancing" of factors to which petitioner objects is required by all of the Circuit Courts in decisions under 20 U.S.C. § 1412 (5)(B), as in all other decisions about services and placements under the IDEA. In essence, petitioner objects to the individualized inquiry required to implement the statutory presumption in favor of mainstreaming which is recognized in all the Circuits interpreting the IDEA.[16]

Second, it is indisputable that according to the factual findings adopted by the district court and the Ninth Circuit, the result would be identical for Rachel Holland in each of the Circuits that have addressed the issue. The petitioner does not even proffer an argument for its claim that, based on the factual findings in this case, Rachel's "mainstreaming rights" would depend on the Circuit in

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of Education, 995 F.2d 1204, 1217-1218 (3rd Cir. 1993); *Greer v. Rome City School District*, 950 F.2d 688, 696-97 (11th Cir. 1991); Ninth Cir. Pet. App. F, p. 21a, footnote 6, citing *Roncker v. Walter* 700 F.2d 1058, 1063 (6th Cir. 1983).

[14] *Greer, supra*, at 697; *Roncker, supra*, at 1063; Dist. Ct. Pet. App. G, p. 36a; Ninth Cir. Pet. App. F, pp. 20a, n.5; 21a.

[15] The district court specifically adopted the factors of the federal appellate courts. Dist. Ct. Pet. App. G, pp. 32a-37a.

[16] Ninth Cir. Pet. App. F, p. 19a. *See Daniel R.R. supra*, at 1048; *Oberti, supra*, at 1213-1214; *Greer, supra*, at 695, *Roncker, supra*, at 1063-1064; *Department of Education v. Katherine D.*, 727 F.2d 809, 817 (9th Cir. 1983), cert. denied, 471 U.S. 1117 (1985); *Lachman v. Illinois State Board of Education*, 852 F.2d 290, 295 (7th Cir. 1988), cert. denied, 484 U.S. 847 (1988); *Devries By DeBlaay v. Fairfax County School Board*, 882 F.2d 876 (4th Cir. 1985); *A.W. v. Northwest R-1*, 813 F.2d 158, 162 (8th Cir. 1987).

which she resides.[17] Pet. p. 13. All of the fact finders in this case found that Rachel receives substantial academic benefit in regular education classes (as well as non-academic benefit). The courts below also specifically found that Rachel could not receive greater or equal educational benefits in special education classes. Dist. Ct. Pet. App. G, p. 41a. Hence, even if there were some merit to petitioner's claim that the Circuit Courts do not all use the same factors, certiorari should be denied because the result would be the same in any of the Circuits to address the issue.

Far from being "skewed too far in favor of categorical full-time regular education placement to comply with IDEA's" mainstreaming "mandate", as the petitioner suggests (Pet. p. 22) the State Department of Education, the district court and the Ninth Circuit simply rejected the petitioner's assertion in each forum that categories of disabled children can be excluded from the regular education classroom, in favor of the individual factual inquiry required by IDEA. As the district court stated:

> Thus, the decision as to whether any particular child should be educated in a regular classroom setting, all of the time, part of the time, or none of the time, is necessarily an inquiry into

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[17] Significantly, the U.S. Department of Justice, which filed an amicus brief on behalf of the U.S. Department of Education in the Ninth Circuit in this case and which has responsibility for nation-wide enforcement of the IDEA, concluded that the district court properly applied the factors identified by other appellate courts in evaluating whether the mainstreaming requirements of IDEA have been met. U.S. Department of Justice Amicus Brief pp. 18-23 for the U.S. Court of Appeals, Ninth Circuit, *Sacramento City Unified School District, Board of Education v. Rachel Holland*, No. 92-15608.

> the needs and abilities of one child, and does not extend to a group or category of handicapped children, as the District suggests. See *Daniel R.R.*, 874 F.2d at 1048 ("our analysis is an individualized, fact specific inquiry").

Dist. Ct. Pet. App. G, p. 37a.

Applying the factors identified by every Circuit to address the mainstreaming requirements of the IDEA, the State Department of Education hearing officer, the district court, and the Ninth Circuit, concluded that the appropriate placement for Rachel Holland, under the IDEA, is a regular education classroom, with supplemental aides and services. The petitioner's request for review by this Court is simply another attempt to relitigate the facts of this case and therefore should be denied.

REASONS FOR DENYING THE WRIT

I. CERTIORARI SHOULD BE DENIED BECAUSE PETITIONER SEEKS REVIEW OF THE INDIVIDUALIZED FACTUAL DETERMINATIONS OF THE CALIFORNIA DEPARTMENT OF EDUCATION AND THE DISTRICT COURT WHICH WERE AFFIRMED BY THE NINTH CIRCUIT THAT RACHEL HOLLAND BENEFITS FROM PLACEMENT IN A REGULAR EDUCATION CLASS

Petitioner's first, second, fourth and fifth Questions Presented are an attempt to relitigate the factual findings of the California Department of Education and federal district court which were affirmed by the Ninth Circuit. In particular, the petitioner, as in the Ninth Circuit, "strenuously disagrees with the district court's findings that Rachel was receiving academic and non-academic benefits in a regular class" because the court's findings

were contrary to the evidence of the petitioner's witnesses. Ninth Cir. Pet. App. F, pp. 21a-22a. Petitioner acknowledges that the findings of fact by the State Department of Education and the district court are not subject to review by this Court. The hearing officer and district court heard conflicting evidence and both concluded that the Holland's witnesses were more knowledgeable, credible and experienced. As the Ninth Circuit stated, "The district court conducted a full evidentiary hearing and made a thorough analysis. . . . We will not disturb the findings of the district court." Ninth Cir. Pet. App. F, 22a. It is well established that this court will not disturb the findings of facts of the lower courts in a case such as this, where there was an opportunity for two full evidentiary hearings.[18]

A. Petitioner's Assertion that the Ninth Circuit Rejected Standardized Aptitude Tests is a Misstatement of the Facts and Law in this Case. The Courts Below Considered Information From a Variety of Sources, as Required by IDEA and Made a Specific Factual Determination That Rachel Holland Benefits From Regular Education Class Placement.

The petitioner's assertion that placement decisions must be "guided by standardized 'aptitude and achievement' tests" and that these tests were per se rejected "as a method of evaluating placement appropriateness", is a

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[18] See *infra*, p. 9 n.9.

misstatement of the law and the facts in this case.[19] Pet., p. 14. The petitioner cites the IDEA implementing regulations, 34 C.F.R. § 300.533(a)(1)(3) for the proposition that standardized aptitude tests must guide placement decisions. In fact, 34 C.F.R. § 300.533(a)(1) commands that information be drawn from a "variety of sources", and 34 C.F.R. § 300.532(a) admonishes that "no single procedure is used as the sole criterion for determining an appropriate educational program for a child".[20] The petitioner's attempt to substitute aptitude tests for the explicit multidisciplinary approach of the IDEA would be wholly unworkable and contrary to well-established practice.[21] As required under the IDEA, the California Department

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[19] This argument appears to address Question Presented No. 4. Question Presented No. 1 suggests either that school districts can unilaterally make placement decisions or that there was consensus among the "educational professionals". Pet. p. i. First, unilateral placement decisions by school officials are contrary to the requirements of the IDEA. *Honig v. Doe*, 484 U.S. 305, 321 (1987). The procedural safeguards of the IDEA assure that parents can challenge all school district decisions regarding evaluations and placement. 20 U.S.C. § 1415 (b)(1)(D)(E), *Board of Education of the Hendrick Central School District v. Rowley*, 485 U.S. 175, 183. Second, as is evident by the record and decisions in this case, the "educational professionals" disagreed about whether Rachel achieves measurable academic progress. Dist. Ct. Pet. App. G, pp. 38a-42a.

[20] 34 C.F.R. § 300.533 also requires that "the placement decision is made in conformity with the least restrictive environment rules in C.F.R. § 300.500 - 300.554"; *see also* 20 U.S.C. 1412(5)(C).

[21] Petitioner's novel argument that the court erred by rejecting standardized aptitude tests or that they were per se rejected was not presented nor briefed in the courts below. Moreover, whether or not the standardized test results indicated progress was also a disputed factual issue. R.T. 465: 9-12.

of Education and federal district court considered information from a variety of sources including testing, extensive observations by many experts, and Rachel's teachers and parents before concluding that Rachel benefitted from her regular class placement. This is the usual process for ascertaining the appropriateness of a particular placement for an individual child. 34 C.F.R. § 300.533; 20 U.S.C. § 1401(20); § 1412(5)(C); § 1414(a)(5).

Furthermore, contrary to the assertion of the petitioner, the district court did not reject the petitioner's experts' testimony because their "standardized testing techniques" were biased by their "educational philosophy". Pet. p.16. Both the State Department of Education and the district court carefully evaluated the evidence from both sides and concluded, based on the knowledge, expertise, experience and credibility of the witnesses that Rachel Holland benefitted significantly from regular education class. The Ninth Circuit explained its reasons for deferring to the factual findings of the district court:

> . . . the court found that the testimony of the Hollands' experts was more credible because they had more background in evaluating children with disabilities placed in the regular classroom and they had a greater opportunity to observe Rachel over an extended period of time in normal circumstances. The district court also gave great weight to the testimony of Rachel's current teacher, Nina Crone, who the court found to be an experienced, skillful teacher.[22]

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[22] Because of the conflict between the experts as to Rachel's academic progress, the district court found "the testimony of her current teacher is all the more important. The District concedes that Nina Crone, Rachel's second grade teacher, is an experienced, skillful teacher. She has no partisan involvement in

Pet. App. F, p. 13a. With respect to non-academic benefits, the Ninth Circuit affirmed that "the testimony of Rachel's mother and her current teacher to be the most credible." Ninth Cir. Pet. App. F, p. 14a. Similarly, on the issue of Rachel's effect on the teacher and other children, the court also found "the most germane evidence" from the second-grade teacher, Nina Crone. *Id.* at 15a. Contrary to petitioner's assertion, these reasons for affording greater weight and credibility to the Holland witnesses have nothing to do with educational philosophy. Dist. Ct. Pet. App. G, p. 41a.

Petitioner's attempt to characterize the district court factual findings as "an explicit rejection" of all standardized testing is completely unsupported by the lower court decisions. As the petitioner recognizes, the lower court's findings of fact based on full evidentiary hearings are not subject to review by this court.[23]

B. The Petitioner Poses a Factual Issue – Repeated Failure – Which is Not Present in The Record.

In the second Question Presented, the school district poses an issue not even presented in this case; that is, whether a child must be subjected to "repeated failure" before a school district can place the child in a special education setting. Pet. p. 15. All of petitioner's assertions about the Ninth Circuit requiring "repeated failure" are based on the premise that the petitioner's witnesses were

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this controversy. Crone testified that Rachel is a full member of the second grade class." Dist. Ct. Pet. App. G, p. 40a- 41a.

[23] See *infra*, p. 9 n.9.

correct that Rachel and all other children with her disability will fail in regular education.[24] This is precisely the factual issue which was resolved in the lower courts in favor of the Holland's witnesses' testimony about the substantial success Rachel experienced in regular education class. The only failure in the record is Rachel's experience in the special education classes of the school district.[25]

To the extent that petitioner is arguing that a legal standard of "repeated failure" is required by the Ninth Circuit, it is a misstatement which cannot be substantiated. There is nothing in any of the decisions below to even suggest such a standard. Petitioner's argument is premised on the false notion that the courts reject standardized tests and therefore the school districts have no choice but to place children in regular classes and wait until they "repeatedly fail" before removal can be considered. Clearly, the Ninth Circuit was not adopting such an ill-founded standard. As explained above, the Court did not per se reject testing as a means of evaluating progress or determining placement. Whether a disabled child has progressed on the IEP goals and objectives and whether the IEP can be implemented in a particular placement are determinations made by the IEP team based on information from a variety of sources, including tests, teacher observations, adaptive behavior and social and cultural factors.[26] Prospective determinations are made every day

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[24] See *infra*, p. 11 n.11.

[25] See *infra*, p. 11 n.12.

[26] Assessments of progress and placement decisions must be made by a multi-disciplinary team including the child's parent and teacher through the statutory required Individualized

for children with disabilities through the IEP process. There is nothing in the Ninth Circuit decision which would disrupt current practice. However, petitioner's suggestion that standardized test scores be the sole criteria, would drastically change current practice and would be wholly contrary to the explicit procedures of the IDEA.

Consistent with decisions of all other appellate courts addressing this issue, the Ninth Circuit applied the statutory preference for mainstreaming in making placement decisions. *Roncker v. Walter*, 700 F.2d 1058 (6th Cir. 1983); *Daniel R.R. v. State Board of Education*, 874 F.2d 1036 (5th Cir. 1989); *Greer v. Rome City School District*, 950 F.2d 688 (11th Cir. 1991). In upholding the presumption in favor of regular class placement, the court below did not preclude the IEP team from making prospective placement decisions. This is what the IEP team normally does based on all the available information. The school district's mischaracterization that the Ninth Circuit automatically requires placement in the regular class and "repeated failure" there before removal to a special education setting can be considered, reflects nothing more than the district's continuing assertion that certain categories of children cannot benefit from regular class placement. Dist. Ct. Pet. App. G, p. 32a. The Ninth Circuit decision simply requires an individualized determination of the appropriate least restrictive placement, consistent with

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Education Program (IEP) process, and must include information from a variety of sources. 20 U.S.C. § 1401(20); § 1412(5)(C); § 1414(a)(5); 34 C.F.R. § 300.533.

the IDEA. After conducting the fact specific inquiry, the lower courts concluded that Rachel Holland experienced repeated success, not failure, in regular education class. This factual finding cannot be disturbed in this Court.

C. Whether the Age Range in a Particular Class is Appropriate for a Specific Child is a Factual Determination

In the fifth Question Presented, petitioner claims that a two year age difference between Rachel and her classmates constitutes a per se violation of the federal mainstreaming requirement. The federal mainstreaming requirement does not specify an exact age range permissible in a regular classroom, nor does it rule out a particular age range as a per se violation of the law. Whether a certain age range is appropriate for an individual child is a factual determination. In this case Judge Levi found that the age difference "is not so pronounced that [Rachel] is learning inappropriate behavior or is not perceived as part of the class." Dist. Ct. Pet. App. G, p. 44a.

II. THE NINTH CIRCUIT OPINION DOES NOT CREATE A CONFLICT WITH OTHER CIRCUIT COURTS. RATHER, THE NINTH CIRCUIT APPLIED THE FACTORS RECOGNIZED BY ALL THE CIRCUIT COURTS WHICH HAVE ADDRESSED THE ISSUE TO DETERMINE WHETHER AN INDIVIDUAL CHILD WITH A DISABILITY CAN BE "SATISFACTORILY EDUCATED" IN A REGULAR EDUCATION CLASS IN ACCORDANCE WITH 20 U.S.C. § 1412(5)(B).

The petitioner's assertion that the Ninth Circuit created a "new test" to determine compliance with 20 U.S.C. § 1412(5)(B) is belied by a review of the Ninth Circuit decision itself. The Ninth Circuit expressly adopted the

factors applied by all of the other Circuit Courts which have addressed the issue, to determine whether Rachel Holland could be satisfactorily educated in regular education classes pursuant to 20 U.S.C. § 1412(5)(B). All of the Circuit Courts have recognized that this highly "fact specific inquiry"[27] requires a balancing of factors to determine whether a child can be satisfactorily educated in regular education classes.

The Ninth Circuit, in adopting the factors set forth in the district court opinion, found no conflict with other Circuits, but instead found that the district court had adopted all of the factors found in the other Circuits.[28] The Ninth Circuit's discussion of these cases makes it clear that as a practical matter, the factors to be considered are consistent, calling upon courts to determine the benefits (both academic and non-academic) of regular class placement with supplementary aids and services and the effect of the disabled child's presence on the teacher and other students.[29]

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[27] See Ninth Cir. Pet. App. F, p. 17a; *Daniel R.R.*, 874 F.2d at 1048; *Roncker*, 700 F.2d at 1064; *Greer*, 950 F.2d at 696; *Oberti*, 995 F.2d at 1223, n.28.

[28] "Although the district court relied principally on *Daniel R.R.* and *Greer*, it did not specifically adopt the *Daniel R.R.* tests over the *Roncker* test. Rather, it employed factors found in both line of cases." Ninth Cir. Pet. App. F, p. 21a

[29] The Ninth Circuit's discussion of the other Circuit Court decisions (Ninth Cir. Pet. App. F, p. 20a, footnote 5 and Ninth Cir. Pet. App. F, p. 21a, footnote 6) demonstrates that the Ninth Circuit incorporated all of the factors found in the other Circuits. While all courts look to the benefits of regular class placement with supplementary aids and services and any possible negative effect on the teacher or the class, the Ninth Circuit noted that the 11th Circuit in *Greer*, 950 F.2d at 696-697 looked at

In fact, it is difficult to decipher where the purported conflict lies.[30]

Likewise, the district court found no conflict in the Circuits and explicitly relied on the decisions of the other appellate courts interpreting 20 U.S.C. § 1412(5)(B) to

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costs as well, and that the 3rd and 11th Circuits in *Oberti*, 995 F.2d at 1216 and *Greer*, 950 F.2d at 697, also look to the comparative benefits of special and regular education placement. These factors were explicitly adopted by the lower courts in this case (Ninth Cir. Pet. App. F, p. 21a; Dist. Ct. Pet. App. G, pp. 32a-33a).

[30] In *Daniel R.R.*, the Fifth Circuit declined to follow the formulation of the Sixth Circuit in *Roncker*, 700 F.2d at 1063, which required a determination of whether the special education services could be provided in regular education classes, preferring to use the words of the statute, "supplementary aids and services" *Daniel R.R.*, 874 F.2d at 1046. As the district court in this case recognized, the inquiry is the same.

The district court correctly viewed *Greer* (following *Daniel R.R.*) and *Roncker* as requiring the school district to consider whether supplemental aids and services would permit satisfactory education in the regular classroom. (Dist. Ct. Pet. App. G., p. 34a). In *Roncker* the question before the court was placement in a segregated facility versus placement in a special education class on a regular school site. For this reason the Court spoke in terms of special education services available at the segregated site being made available in a special day class. *Roncker, supra* at 1063. For the purposes of determining whether regular class placement is appropriate, the fact that the *Roncker*, court refers to the services in reference to the services available in special education and the *Daniel R.R.*, 874 F. 2d at 1048, *Greer*, 950 F.2d at 696 and *Oberti*, 995 F. 2d at 1214 courts refer to the services in reference to the statutory language of "supplementary aids and services" is of no practical import. All the courts require consideration of the aids and services which a child with a disability may require to benefit from regular education placement. Ninth Cir. Pet. App. F, p. 20a, footnote (5) *Daniel R.R., supra, Greer, supra, Oberti, supra.*

"guide the court's analysis." Dist. Ct. Pet. App. G, p. 32a. The district court stated:

> The federal appellate courts have recognized the following factors as relevant to determining if a placement is appropriate: (1) the educational benefits available to the child in a regular classroom, supplemented with appropriate aids and services, as compared to the educational benefits of a special education classroom; (2) the non-academic benefits to the handicapped child of interaction with nonhandicapped children; (3) the effect of the presence of the handicapped child on the teacher and other children in the regular classroom; and (4) the costs of supplementary aids and services necessary to mainstream the handicapped child in a regular classroom setting. *Greer v. Rome City School District*, 950 F.2d 688, 697 (11th Cir. 1991); *Barnett v. Fairfax County School Board*, 927 F.2d 146, 153-54 (4th Cir.), *cert. denied*, 112 S. Ct. 175, 116 L. Ed. 2d 138 (1991); *Daniel R.R.*, 874 F.2d at 1048-50; *Roncker v. Walter*, 700 F.2d 1058 (6th Cir.), *cert. denied*, 464 U.S. 864, 104 S.Ct. 196, 78 L.Ed. 2d 171 (1983).

Pet. App. G, pp. 32a-33a.

The district court cited both *Daniel R.R.* and *Roncker* as authority in identifying the proper factors to be considered in applying § 1412(5)(B) to the facts of a particular case and relied on the analysis set forth in each of these appellate court decisions in its discussion of these factors. Dist. Ct. Pet. App. G, pp. 32a-38a. The district court correctly found consistency, not conflict, in these decisions.

The petitioner offers no support for its claim that the Ninth Circuit's test "differs significantly in its analytic approach." Pet. p. 12. As stated above, both the district

court and the Ninth Circuit relied on these other decisions and adopted common factors, finding no conflict. The petitioner cannot point to any of the standards adopted by the Ninth Circuit that conflict with other Circuits or would in any way affect the outcome of this case. It is difficult to understand which standard petitioner objects to. Clearly, the IDEA requires the court to look at the benefits (academic & non-academic) of the regular class placement. It appears unlikely that the petitioner is objecting to the Court's consideration of any disruptive effect on the teacher or other children or the costs of regular education placement. Each of these factors was carefully examined, and it was decided that Rachel receives substantial benefit from regular class placement, is not disruptive and that the cost is not significant. The petitioner is attempting to create an artificial split in the Circuits because it does not approve of the mainstreaming presumption employed by all the Circuits[31] and with the outcome of this case.

The contention that the other appellate decisions offer limits to mainstreaming not found in the Ninth Circuit has no basis.[32] The only limit which petitioner claims exists in other Circuits comes from a gross misstatement of the standards enunciated in those cases. The petitioner wrongly claims that the *Daniel R.R.* test limits regular education placement "if the child does not have the cognitive ability to grasp the essential elements of the

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[31] 20 U.S.C. § 1412(5)(B); See also *infra*, p. 11 n.12, p. 13 n.16.

[32] If anything, the Ninth Circuit provides a limit not found in other cases by allowing consideration of the costs of regular education placement. See discussion, *infra*, pp. 23-24 n.29.

regular education curriculum." Pet., p. 11. This characterization of *Daniel R.R.* is particularly astounding in that the Fifth Circuit explicitly overturned the lower court in that case because it "would require handicapped children to learn at approximately the same level as their non-handicapped classmates" and because the lower court "places too much emphasis on the handicapped student's ability to achieve an educational [academic] benefit." *Daniel R.R.*, 874 F.2d at 1046. Throughout its opinion, the Fifth Circuit "reiterate[s] . . . that academic achievement is not the only purpose of mainstreaming."[33] The Fifth Circuit emphasized the need to look at the "overall educational experience in the mainstreamed environment, balancing the benefits of regular and special education for each handicapped child."[34]

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[33] *Id.* The district court in this case quoted the Fifth Circuit as follows:

> (The language and behavior models available from non-handicapped children may be essential or helpful to the handicapped child's development. In other words, although a handicapped child may not be able to absorb all of the regular education curriculum, he may benefit from non-academic experiences in the regular education environment) District Court, Pet. App., G., p. 34a, citing *Daniel R.R.*, 874 F.2d at 1049

[34] 874 F.2d at 1049. The petitioner claims that the district court departed from *Daniel R.R.* because it did not consider curriculum modification as a separate factor. In *Daniel R.R.*, the court was concerned about curriculum modification as it related to the burden on the teacher and the benefits received by the child with a disability, stating that mainstreaming would not be appropriate if "the only advantage to such an arrangement would be that the child is sitting next to a nonhandicapped student" 874 F.2d at 1049. Similarly, the district court in this case considered curriculum modification relevant for the same reasons – the burden on the teacher and the disabled child's "sense of belonging in the class". Dist. Ct. Pet. App. G, p. 37a.

The petitioner's assertion that the Ninth Circuit's purported "new test" subordinates academic progress to mainstreaming is also without merit and flatly inconsistent with the facts of this case. The courts below did not adopt any general standards which create any conflict between the requirements that children with disabilities receive "appropriate" education and the mainstreaming requirements in 20 U.S.C. § 1412(5)(B). The court below held that regular education class is required only when the child can receive an appropriate education there. The district court defined as the "central question" whether, "for Rachel, a full-time placement in regular education class is the "appropriate" placement. Dist. Ct. Pet. App. G, p. 25a. In determining whether Rachel could receive an appropriate education in the regular education class, the court did not elevate mainstreaming over educational progress as petitioner claims (Pet. p. 19), but rather examined the specific goals and objectives in Rachel's Individual Education Plan (IEP) and found based on the evidence, "that all of Rachel's goals and objectives could be achieved either in regular class with some curriculum modification or through supplementary aids and services." Dist. Ct. Pet. App. G, pp. 27a, 40a-42a.

Moreover, the courts below made specific findings that special education did not offer better or equal academic or non-academic benefits to Rachel.[35] Hence, the petitioner's hypothetical assertion that the Ninth Circuit

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[35] Ninth Cir. Pet. App. F, p. 13a; "[t]he district offered no persuasive evidence that Rachel could receive educational benefits in special education classes that are equal or greater than those available in special [sic; regular] education classes." Dist. Ct. Pet. App. G, p. 41a.

elevated mainstreaming over academic benefit is simply not presented in this case.[36]

The Ninth Circuit opinion creates no conflict with the other Circuits. Rather, the district court and the Ninth Circuit explicitly relied on these opinions and adopted all of the factors identified by the other Circuits to determine compliance with 20 U.S.C. § 1412(5)(B). Moreover, it is indisputable that given the factual findings in this case, the result would be the same in the other Circuits. This is not a close case. Every Circuit to consider the issue recognized that if a child receives "substantial" educational benefit, is a "full member" of the class and poses no disruption to the teacher or other children, regular education class placement is appropriate. Dist. Ct. Pet. App. G, pp. 41a-42a, 44a-45a. There is no conflict or factual error for this court to resolve.

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[36] Many courts have recognized as Judge Levi cited, that "the Act's requirement of integration, based on recognition of the non-academic value of such integration, is not overcome by a showing that special education placement may be academically superior to placement in a regular classroom." Dist. Ct. Pet. App. G, p. 33a. *Roland v. Concord School Comm.*, 910 F. 2d 983, 993 (1st Cir. 1990), *Roncker*, 700 F.2d at 1063; *Norton School Comm. v. Massachusetts Dept. of Education*, 768 F. Supp. 900, 910 (D. Mass. 1991), *Daniel R.R.*, 874 F.2d at 1048. Judge Levi's statement emphasizes the need to balance various factors. It in no way suggests that a child should be placed in a class where he or she cannot receive an appropriate education.

Moreover, as these cases show, the issue of academic benefit versus overall educational benefits is often resolved in favor of school districts seeking to place children in the regular classroom as opposed to "academically superior" private schools. It is well established that school districts are not required to automatically place children in the "academically superior" class or school, disregarding other factors such as the benefits of mainstreaming. *Id.*

CONCLUSION

For the foregoing reasons, respondent respectfully submits that the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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